Murtis Taylor Human Services Systems *and* Alton Hill *and* Service Employees International Union District 199, WV/KY/OH, The Healthcare and Social Services Union *and* Clover English, III. Cases 08–CA–061918, 08–CA–066225, 08–CA–080403, 08–CA–086181, and 08–CA–087325

March 25, 2014

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS HIROZAWA AND JOHNSON

On May 21, 2013, Administrative Law Judge Paul Bogas issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified and set forth in full below.[2]

The judge found, among other things, that the Respondent violated Section 8(a)(3) and (1) of the Act by suspending Alton Hill because of his conduct in representing fellow employee Christine Zeh at an investigative interview, and it violated Section 8(a)(5) and (1) by unilaterally implementing a policy requiring employees to sign the notes of investigative interviews to attest to the veracity of those notes. For the reasons that follow, we adopt these findings.[3]

I. ALTON HILL'S SUSPENSION

Alton Hill has worked for the Respondent for 15 years and has served as a union delegate[4] for 13 or 14 of those years. As a delegate, Hill represented employees in disciplinary proceedings, participated in administrative investigations, filed grievances, and served as a member of the Union's contract bargaining team. On July 22, 2011, the Respondent held a pre-disciplinary investigative interview of unit employee Christine Zeh as part of its investigation of Zeh's Medicaid billing and possible theft of time by her use of paid sick leave while performing functions for another employer. Hill served as Zeh's *Weingarten*[5] representative at the interview.[6] The Respondent never advised Zeh or Hill about the subjects of the investigation.

During the interview, Hill asked Human Resource Director Bill Newsome about the purpose of the Respondent's questioning. Newsome stated that the Respondent was investigating a possible "conflict of interest," but did not elaborate. Hill repeatedly asked what the purported conflict of interest was and told Newsome that Zeh would cooperate and answer his questions if he described the alleged conflict of interest.

At various times, Hill asked for clarification about the purported conflict of interest, and he advised Zeh not to answer certain questions until the Respondent provided clarification. When Newsome asked Zeh if she was em-

[1] There are no exceptions to the judge's findings that the Respondent violated Sec. 8(a)(1) of the Act by threatening Christine Zeh with discharge during an investigatory interview and Sec. 8(a)(5) and (1) by unilaterally introducing an employee incentive program and dealing directly with employees about that program. There are also no exceptions to the judge's findings that the Respondent did not violate Sec. 8(a)(5) and (1) by assigning non-Medicaid caseloads to community psychiatric support treatment workers or Sec. 8(a)(1) by restricting the right of union representatives to assist employees during interviews.

To the extent that the Respondent implicitly excepted to some of the judge's credibility resolutions, we note that the Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Drywall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] We agree with the judge that the Respondent violated Sec. 8(a)(3) and (1) by suspending Alton Hill and Sec. 8(a)(5), (3), and (1) by discharging Clover English III. We shall modify the judge's recommended Order to require the Respondent to compensate Hill, English, and any other employees adversely affected by the unlawfully imposed requirement that employees sign a copy of notes of an investigative interview for the adverse tax consequences, if any, of receiving lump-sum backpay awards and to file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters.

We shall also conform the Order to our standard remedial language and include the appropriate cease-and-desist language for the judge's finding (to which there are no exceptions) that the Respondent violated Sec. 8(a)(5) and (1) by implementing a new incentive program for unit employees without providing the Union with notice and an opportunity to bargain. We shall also substitute a new notice to conform to the Order as modified.

[3] We agree with the judge, for the reasons he stated, that the Respondent violated Sec. 8(a)(1) by investigating Hill for Medicaid fraud, by requiring him to provide documentation confirming his immigration status and to provide the declarations page for his automobile insurance, and by restricting him from entering any of its facilities other than the facility where his workstation was located. We further note that there are no allegations that any of this conduct violated Sec. 8(a)(3).

Member Johnson agrees that the Respondent violated Sec. 8(a)(1) by requiring Hill to provide documentation confirming his immigration status on July 18, 2011, but he would not rely on unfair labor practices occurring after this event as evidence of animus proving this particular violation.

[4] The Union also refers to its delegates as stewards.

[5] *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975).

[6] All parties agree that Zeh was entitled to representation under *Weingarten*, supra.

ployed by another entity, Hill told Zeh, "That's none of his business what you do on your time." Near the end of the interview, Hill again asked Newsome to describe the purported conflict of interest. Newsome alluded to evidence that "on [June] 27th, [Zeh] punched in, went to [an] orientation [with another employer], came back, punched out." Newsome continued to ask Zeh about whether she worked for another employer. After Zeh persisted in refusing to answer that question, Newsome confiscated Zeh's badge and keys. Zeh left the facility, was placed on suspension, and thereafter resigned her employment with the Respondent.

Newsome never identified the purported "conflict of interest" or explained that it involved a possible theft of time or Medicaid billing problems. His comment about punching in and then attending an orientation meeting did not clear up Hill's confusion. Indeed, Tamera Arnold, the Respondent's director of quality improvement, testified that Hill did not appear to understand what the meeting was about.

At no time during the interview did Hill attempt to prevent Zeh from answering questions. Although he advised Zeh not to incriminate herself, Zeh's refusal to answer questions was her own choice. Although the record shows that Hill used a loud voice at times, he did not engage in any threatening behavior, did not prevent the Respondent from asking questions, and did not prevent Zeh from answering questions.

On August 18, 2011, the Respondent suspended Hill for 10 days without pay. The disciplinary notice stated that Hill was suspended because he "obstructed an investigation by advising Dr. Zeh to refuse to obey her superior's orders to answer questions and cooperate with the investigation." Newsome testified that the purpose of the suspension was to send Hill and other union representatives a message that Hill's "type of behavior would not be allowed, [and to] put them also on record that they understand the gravity of such could ultimately . . . lead to discharge." Under the Respondent's progressive discipline system, the suspension also constituted a final warning.[7]

The judge found that the Respondent unlawfully suspended Hill for his conduct during the investigative interview. Applying the standard set forth in *Atlantic Steel Co.*, 245 NLRB 814 (1979),[8] the judge found that Hill did not engage in conduct so opprobrious or extreme as to lose the protection of the Act. In its exceptions, the Respondent contends that the judge erred by failing to define the permissible limits of a *Weingarten* representative's behavior more narrowly than in other circumstances of an employee union representative's communications with management, where it asserts that *Atlantic Steel* standard applies. Further, the Respondent contends that Hill exceeded these limits and thereby lost the Act's protection against discipline for his conduct.[9] Contrary to the Respondent, even if we assume, arguendo, that its legal theory is meritorious, we find that Hill did not lose the Act's protection.

Serving as an employee's *Weingarten* representative is protected union activity. *Corrections Corp. of America*, 347 NLRB 632, 636 (2006). The role of the union representative is to provide assistance and counsel to the employee being interrogated. *Weingarten*, 420 U.S. at 262–263. This assistance includes attempts "by the union representative . . . to clarify the issues" being investi-gated. See *Postal Service*, 351 NLRB 1226, 1227 fn. 3 (2007) (quoting *Weingarten*, 420 U.S. at 262 fn. 7). To that end, the Board has found that a *Weingarten* representative's conduct remains protected even when the representative interrupts the respondent's questioning to ask clarifying questions. *Postal Service*, 288 NLRB 864, 868 (1988).[10]

Here, as found by the judge, Hill's interruptions and objections were mainly attempts to clarify the issues being investigated. Throughout the interview, Hill asked Newsome to clarify the nature of the alleged conflict of interest, but Newsome never explained the allegations being investigated. Further, although Hill advised Zeh to refrain from answering certain questions while he persisted in trying to obtain clarification as to the purported conflict of interest claim, this conduct did not fall outside the permissible scope of representative activity under *Weingarten*. See *Postal Service*, 288 NLRB at 868.

The Respondent's contention that Hill impeded the investigation is not supported by the record. Indeed, the Respondent was able to ask all of its questions, and Zeh had an opportunity to respond to every question if she chose to do so. As mentioned above, Hill never inter-

[7] The disciplinary notice issued to Hill referred to Hill's discipline as a suspension and final warning. Consistent with the judge's decision and the parties' references to this discipline, we shall hereafter refer to this discipline simply as a "suspension," except that the Order and notice to employees shall—for purposes of clarity—include reference to the warning as well as the suspension.

[8] In *Atlantic Steel*, the Board balanced the following factors to determine whether an employee engaged in protected activity lost the protection of the Act by opprobrious conduct: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was in any way provoked by an employer's unfair labor practice. Id. at 816.

[9] In support of its argument, the Respondent cites, among other cases, *Mead Corp.*, 331 NLRB 509, 516 (2000), and *Yellow Freight System*, 317 NLRB 115, 124 (1995).

[10] In *Postal Service*, the Board found that the Respondent violated Sec. 8(a)(1) by denying the representative the right to continue participating in the interview after interrupting the respondent's questioning three times in order to clarify certain points. Id.

rupted Zeh's attempts to answer questions, and he did not prevent Zeh from answering any questions. Cf. *New Jersey Bell Telephone Co.*, 308 NLRB 277, 278–279 (1992) (finding that the employer lawfully ejected the *Weingarten* representative from investigatory interview where the representative's persistent objections to, and interruptions of, the employer's questions prevented it from repeating some of them and interfered with the employer's ability to effectively conduct the interview).

In sum, we find that, at all times during Zeh's investigative interview, Hill's conduct remained within the permissible bounds of protected *Weingarten* representation. Therefore, as it is not disputed that Hill was disciplined because of his conduct in the interview, we find that the Respondent violated Section 8(a)(3) and (1) by suspending Union Delegate Alton Hill.[11]

II. THE INVESTIGATIVE INTERVIEW SIGNATURE REQUIREMENT

On March 12, 2012, the Respondent, through Newsome, conducted an investigative interview of unit employee Clover English. Human Resource Manager Jennifer Harden and Director of Quality Improvement Tamera Arnold took notes during the interview on their laptop computers. At the conclusion of the interview, Newsome reviewed the notes, made some changes, and presented them to English. Newsome directed English to review the notes, make any changes that were necessary, and then sign the document. The document included the following statement below the signature line: "Refusal to acknowledge the veracity or to correct the statement in writing is equivalent to refusal to cooperate with the administrative investigation."

English declined to sign the notes because he did not think they were accurate or complete. Newsome told English that if he did not sign the notes, he would have to turn over his badge, keys, and other administrative property. Newsome then presented English with another document informing him that his refusal to sign the notes "rises to the level of insubordination" and is a "Class III" infraction. Newsome then told English that he could take the notes to his attorney for review, but that English could not return to work until he signed the document. Newsome collected English's keys and badge, and English left the Respondent's facility.[12]

English's interview was the first time the Respondent required an employee to attest to the veracity of investigative interview notes.[13] The Respondent did not notify the Union, prior to English's interview, that it would be implementing such a requirement.

The judge found that the Respondent violated Section 8(a)(5) and (1) by unilaterally implementing a requirement that employees sign the notes of administrative interviews to attest to the notes' veracity.[14] In so finding, the judge rejected the Respondent's contention that its implementation of the signature requirement was permissible under the management-rights clause in the parties' collective-bargaining agreement. The judge found that the management-rights clause was limited by a separate contractual notice provision requiring the Respondent to provide notice of any new policies at least 30 days prior to implementation, and that the Respondent failed to give the Union any notice prior to implementing the signature requirement. The judge therefore concluded that the management-rights clause did not privilege the Respondent's conduct.

On exception, the Respondent argues that any purported failure to provide notice to the Union was, at most, a violation of the collective-bargaining agreement, but not a violation of the Act. The Respondent maintains that by agreeing to the management-rights clause in the collective-bargaining agreement, the Union waived its statutory right to bargain over the change. For the reasons that

[11] In light of our disposition of this issue, we find it unnecessary to pass on the judge's decision to apply *Atlantic Steel*, supra, in determining whether an employee *Weingarten* representative can be disciplined for disruption of an investigative interview. We likewise find it unnecessary to pass on the judge's alternative finding that Hill's suspension and warning were unlawful under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). Even assuming these alternative analyses are applicable to these circumstances, neither of them would require a different result.

Member Hirozawa agrees with his colleagues that Hill was engaged in protected activity while serving as Zeh's *Weingarten* representative and that Hill never impeded the interview or otherwise acted in a manner inconsistent with the active participation of the representative as contemplated in *Weingarten*. Had he done so, the Respondent may have been privileged to end his participation in the interview, but whether the Respondent could also have *disciplined* him would depend on whether, under *Atlantic Steel*, Hill's conduct was so opprobrious as to forfeit the protection of the Act. See *Hawaii Tribune Herald*, 356 NLRB No. 63, slip op. at 1, 8-9, 20-21 (2011) (respondent unlawfully suspended and discharged union steward who confronted supervisor while attempting to serve as a *Weingarten* representative, because his protected conduct did not lose the protection of the Act under *Atlantic Steel*).

[12] About 2 days later, English left messages for the Respondent stating that he was still not comfortable signing the notes, and that he was inquiring about his employment status. None of the Respondent's officials returned English's messages.

[13] In the past, the Respondent had periodically requested that employees sign its notes of investigative interviews, but it had never required an employee to sign interview notes and never stated that employees would be disciplined if they failed to do so.

[14] The judge found, and we agree, that the new signature requirement was a material, substantial, and significant change in terms and conditions of employment.

follow, we find the Respondent's contention is without merit.

The management-rights clause, articles 3.0 and 3.2 of the parties' collective-bargaining agreement, provides:

> The Employer also has the right to make and alter from time to time reasonable rules and regulations, not inconsistent with this Agreement, to be observed by employees. . . . Employees shall carry out all reasonable orders, directions and instructions, provided such orders do not unduly or unreasonably endanger health and safety.

The separate notice provision, article 20.1 of the collective-bargaining agreement, requires that "[a]ll new or revised policies and procedures relating to bargaining unit employees shall be distributed to the Executive Board Members no less than 30 days prior to implementation whenever possible."

Having considered the implementation of the new signature requirement in light of these provisions, we find that the Union did not waive its right to bargain over this change. Under the Board's long-settled "clear and unmistakable waiver" standard, the burden is on the party asserting waiver to establish that the parties "unequivocally and specifically express[ed] their mutual intention to permit unilateral employer action with respect to a particular employment term." *American Medical Response of Connecticut, Inc.*, 359 NLRB No. 144, slip op. at 2 (2013) (quoting *Provena St. Joseph Medical Center*, 350 NLRB 808, 811 (2007)). The Respondent did not meet its burden.[15]

The reference to rules and regulations in the management-rights clause is "couched in general terms and does not clearly cover" the new signature policy implemented by the Respondent. See *Dorsey Trailers, Inc.*, 327 NLRB 835, 836 (1999) (management-rights clause referring to "reasonable rules, not in conflict with this agreement" was too vague to waive union's right to bargain over changes to the attendance policy), enfd. in relevant part 233 F.3d 831 (4th Cir. 2000). Indeed, the clause does not mention any policies or procedures relating to investigative interviews, or investigations of any kind. Therefore, in the absence of any specific language referencing such interviews or investigations, the clause is too vague to constitute a waiver of the Union's statutory right to bargain over the imposition of this new requirement. See *Frontier Hotel & Casino*, 323 NLRB 815, 818 fn. 12 (1997) (management-rights clause indicating that respondent could establish work procedures did not privilege it to introduce a rule requiring union representatives to publicly acknowledge their familiarity with the visitation section of the contract).

Further, the Respondent presented no evidence that such a requirement was consciously explored in bargaining or that the Union intentionally relinquished its right to bargain over the topic. See *Provena St. Joseph Medical Center*, 350 NLRB at 815. And, in agreement with the judge, we find that the Respondent's failure to provide notice to the Union's executive board also precluded it from relying on the management-rights clause. For all of these reasons, we find that the Respondent did not meet its burden of showing that the Union clearly and unmistakably waived its right to bargain over the imposition of the signature requirement. Therefore, we adopt the judge's finding that the Respondent violated Section 8(a)(5) and (1) by unilaterally implementing the new signature requirement prior to English's investigative interview.[16]

ORDER

The National Labor Relations Board orders that the Respondent, Murtis Taylor Human Services Systems, Cleveland, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening its employees with discipline, discharge, or other unspecified reprisals because they engage in union and/or protected concerted activity.

(b) Requiring its employees to provide documentation confirming their immigration and/or citizenship status because they have engaged in union and/or protected concerted activity.

(c) Requiring its employees to provide the declarations page of their automobile insurance because they have engaged in union and/or protected concerted activity.

(d) Initiating a fraud investigation against its employees because they have engaged in union and/or protected concerted activity.

(e) Searching or blocking access to employees' offices because they have engaged in union and/or protected concerted activity.

(f) Denying employees access to any of its facilities because they have engaged in union and/or protected concerted activity.

(g) Suspending, warning, discharging, or otherwise discriminating against its employees because they have engaged in union and/or protected concerted activity.

[15] Member Johnson notes that the Respondent does not contest the applicability of the "clear and unmistakable waiver" standard.

[16] We also agree with the judge that the Respondent discharged English pursuant to its unlawfully adopted rule. Therefore, we adopt the judge's finding that the Respondent violated Sec. 8(a)(5), (3), and (1) by discharging English.

(h) Unilaterally, and in a manner that is not authorized by the collective-bargaining agreement, implementing a rule requiring that employees sign a copy of any notes of an investigative interview.

(i) Suspending, discharging, or otherwise discriminating against its employees because they refuse to comply with an unlawfully adopted rule.

(j) Implementing new incentive programs for unit employees without first providing the Union with notice and an opportunity to bargain.

(k) Bypassing the Union and dealing directly with unit employees concerning changes to their wages, hours, and other working conditions.

(l) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of the Board's Order, offer Clover English III full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Alton Hill whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of the judge's decision.

(c) Make Clover English III, and any other employees adversely affected by the unlawfully imposed requirement that employees sign a copy of notes of an investigative interview, whole for any loss of earnings and other benefits suffered as a result of the unlawfully imposed requirement, in the manner set forth in the remedy section of the judge's decision.

(d) Compensate Alton Hill, Clover English III, and any other employees adversely affected by the unlawfully imposed requirement that employees sign a copy of notes of an investigative interview, for the adverse consequences, if any, of receiving lump-sum backpay awards, and file a report with the Social Security Administration allocating the backpay to the appropriate calendar quarters.

(e) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful suspension and final warning of Alton Hill, the unlawful discharge of Clover English III, including any reference suggesting that English resigned his position, and to the discipline taken against any other employees as a result of the unlawfully imposed requirement that employees sign a copy of notes of an investigative interview, and within 3 days thereafter notify them in writing that this has been done and that the discipline will not be used against them in any way.

(f) Rescind the rule that requires unit employees to sign a copy of any notes of an investigative interview.

(g) On request by the Union, rescind the incentive program that it unlawfully implemented in about January 2012.

(h) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(i) Within 14 days after service by the Region, post the attached notice marked "Appendix" in each of its facilities in the city of Cleveland, Ohio, and the Greater Cleveland Area.[17] Copies of the notice, on forms provided by the Regional Director for Region 8, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 18, 2011.

[17] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(j) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. March 25, 2014

Mark Gaston Pearce, Chairman

Kent Y. Hirozawa, Member

Harry I. Johnson, III, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT threaten you with discipline, discharge, or other unspecified reprisals because you engage in union and/or protected concerted activity.

WE WILL NOT require that you provide documentation confirming your immigration and/or citizenship status because you engage in union and/or protected concerted activity.

WE WILL NOT require that you provide the declarations page of your automobile insurance because you engage in union and/or protected concerted activity.

WE WILL NOT initiate a fraud investigation against you because you engage in union and/or protected concerted activity.

WE WILL NOT search or block access to your office because you engage in union and/or protected concerted activity.

WE WILL NOT deny you access to any of our facilities because you engage in union and/or protected concerted activity.

WE WILL NOT suspend, warn, discharge, or otherwise discriminate against you because you engage in union and/or protected concerted activity.

WE WILL NOT unilaterally, and in a manner that is not authorized by the collective-bargaining agreement, implement a rule requiring you to sign a copy of any notes of an investigative interview.

WE WILL NOT suspend, discharge, or otherwise discriminate against you because you refuse to comply with an unlawfully adopted rule.

WE WILL NOT implement a new employee incentive program without first notifying the Union and giving it an opportunity to bargain.

WE WILL NOT bypass the Union and deal directly with you concerning changes to your wages, hours, and other working conditions.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, within 14 days from the date of the Board's Order, offer Clover English III full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Alton Hill whole for any loss of earnings and other benefits resulting from his unlawful suspension, less any net interim earnings, plus interest.

WE WILL make Clover English III, and any other employees adversely affected by the unlawfully imposed requirement that employees sign a copy of notes of an investigative interview, whole for any loss of earnings and other benefits resulting from the unlawfully imposed requirement, less any net interim earnings, plus interest.

WE WILL compensate Alton Hill, Clover English III, and any other employees adversely affected by the unlawfully imposed requirement that employees sign a copy of notes of an investigative interview, for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and WE WILL file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters.

WE WILL remove from our files any reference to our unlawful suspension and final warning of Alton Hill, our unlawful discharge of Clover English III, and to the discipline taken against any other employees as a result of our unlawfully imposed requirement that employees sign

a copy of notes of an investigative interview, and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that the discipline will not be used against them in any way.

WE WILL rescind the rule that requires you to sign a copy of the notes of an investigative interview that was unilaterally implemented on March 12, 2012.

WE WILL, on request by the Union, rescind the incentive program that we unilaterally implemented in about January 2012.

MURTIS TAYLOR HUMAN SERVICES SYSTEMS

Gina Fraternali, Esq., for the Acting General Counsel.
Brian S. Carroll, Esq. (Burdzinski & Partners), of Pratt, Kansas, for the Respondent.
Cathy Kaufmann, Esq., of Cleveland, Ohio, for the Service Employees International Union.

DECISION

STATEMENT OF THE CASE

PAUL BOGAS, Administrative Law Judge. This case was tried in Cleveland, Ohio, on January 7, 8, and 9, 2013. Alton Hill, an individual, filed the charge in Case 08–CA–061918 on August 1, 2011, and amended charges on September 20, 2011, November 22, 2011, February 29, 2012, and September 28, 2012. Service Employees International Union District 1199, WV/KY/OH, The Healthcare and Social Services Union (the Union), filed the charge in Case 08–CA–066225 on October 6, 2011, and amended charges on October 27, 2011, December 7, 2011, February 1, 2012, March 22, 2012, and April 30, 2012. The Union filed the charge in Case 08–CA–080403 on May 7, 2012, the charge in Case 08–CA–086181 on July 27, 2012, and the amended charge in Case 08–CA–086181 on September 28, 2012. Clover English III, an individual, filed the charge in Case 08–CA–087325 on August 15, 2012. The Acting Regional Director for Region 8 of the National Labor Relations Board (the Board) filed the amended consolidated complaint and notice of hearing (the complaint) on October 29, 2012. The complaint alleges that Murtis Taylor Human Services Systems (the Respondent) violated Section 8(a)(1) of the National Labor Relations Act (the Act) by responding to employees' protected concerted activities by making various inquiries and investigations into employee qualifications and conduct, threatening employees with discharge, imposing a restriction on an employee's access to facilities, and restricting the right of a union representative to participate in investigatory meetings. The complaint further alleges that the Respondent violated Section 8(a)(3) and (1) of the Act by suspending Hill and terminating English because they engaged in union and protected concerted activity. In addition, the complaint alleges that the Respondent failed to bargain in good faith with the Union in violation of Section 8(a)(5) and (1) when it unilaterally implemented a performance incentive, assigned employees to new positions without following contractual posting procedures, and unilaterally instituted a requirement that employees sign the transcripts of administrative hearings and terminated an employee for failing to do so. The Respondent filed a timely answer in which it denied that it had committed any of the alleged violations.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the Acting General Counsel (the General Counsel) and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation, provides health services, mental health services, and social services on an outpatient basis at its facilities in Cleveland, Ohio, and the Greater Cleveland area, where it annually derives gross revenues in excess of $500,000, and purchases and receives products, goods, and materials valued in excess of $5000 directly from points outside the State of Ohio. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background Facts

The Respondent provides medical services, mental health services, and social services funded by public and charitable sources. It has approximately 12 buildings around the greater Cleveland area, and provides services to clients at its own facilities and also at locations such as schools, hospitals, and social services offices. The Respondent has approximately 400 full-time and part-time employees, of whom about 200 are in a bargaining unit represented by the Union.[1] Many of the unit members involved in these proceedings are caseworkers—known at the Respondent as community psychiatric support treatment workers or CPSTs. The most recent collective-bargaining agreement between the Respondent and the Union is effective by its terms from November 1, 2011, until October 31, 2014.

Lovell Custard has been the Respondent's president and chief executive officer since 2010, and prior to that he was the Respondent's chief fund raiser. William Newsome, who came to the Respondent in January 2011, is the Respondent's human resources director, building services and safety director, and corporate compliance officer. Charging Party Hill is a caseworker on the Respondent's "Intensive Team" and a union delegate. He is one of four union delegates for the bargaining unit. Charging Party English is a licensed social worker who began working for the Respondent in 2010 as a therapist—a bargaining unit position.

[1] That unit consists of all program and nonprogram staff members employed by the Employer at its facilities in the city of Cleveland, Ohio, and the Greater Cleveland area, excluding all confidential employees, managerial employees, guards, supervisors, temporary employees, part-time employees, as well as the excluded positions specifically listed in art. I, sec. 1.1 of the collective-bargaining agreement with effective dates of November 1, 2011, through October 31, 2014.

B. Alleged Discrimination and Unlawful Conduct Involving Alton Hill

The complaint alleges that the Respondent violated Section 8(a)(1): on about July 18, 2011, when, because of Hill's union and/or protected concerted activity, the Respondent requested that Hill confirm his immigration and/or citizenship status; on July 22, 2011, when Newsome threatened employees with discharge because of their union and/or protected activity; on about August 2, 2011, when, because of Hill's union and/or protected concerted activity, the Respondent requested that Hill provide the declarations page for his automobile insurance; in July and/or August 2011, when, because of Hill's union and/or protected activity, the Respondent initiated a Medicaid fraud investigation against Hill, searched Hill's office, and blocked access to Hill's office; and, since about August 2011, when, because of Hill's union and/or protected concerted activity, the Respondent restricted Hill's access to its facilities other than the one where Hill's office was located. The General Counsel also alleges that the Respondent violated Section 8(a)(3) and (1) when, on about August 18, 2011, it issued a 10-day suspension to Hill because Hill engaged in union and/or protected concerted activities, and to discourage employees from engaging in these activities.

1. Facts

Hill, one of the two individual Charging Parties in this case, has been employed by the Respondent for 15 years and has served as one of the Union's delegates for 13 or 14 of those years. Hill's responsibilities as a union delegate include representing union members in disciplinary proceedings, participating in administrative investigations, keeping union members informed about the Union's activities, and filing grievances. He was also a member of the Union's contract bargaining team in 2011. Prior to when Custard became president and chief executive in 2010, and Newsome became human resources director in January 2011, Hill had never been disciplined for his conduct while performing his duties as a union delegate. The General Counsel alleges that, beginning in July 2011, the Respondent attempted to intimidate Hill because of his union and protected concerted activities by, inter alia, targeting him with a fraud investigation, requesting unusual forms of documentation from him, and suspending him for 10 days.

a. Demand that Hill provide documentation to support I-9 form

Cherise Rias is a human resources clerk, and agent of the Respondent,[2] who works in the department that Newsome heads. By email dated Monday, July 18, 2011, Rias told Hill that the Respondent "need[ed] a copy of your social security card and birth certificate by 7/19/2011." Hill responded on July 20 with an email asking why the Respondent needed this documentation from him. Rias answered that the documentation was required to verify information concerning his immigration and citizenship status for purposes of his I-9 form (Employment Eligibility Verification Form). Hill testified that he is a United States citizen and that the Respondent had never previously asked him to provide I-9 documentation during his 15 years with the organization. The Respondent submitted its written policy on "Immigration Law Compliance." That policy requires that new employees and, in some cases, returning employees, provide I-9 form documentation, but it does not require such documentation from incumbent employees such as Hill.

Rias denied that anyone had asked her to target Hill, and stated that she requested the documentation from Hill as part of an audit of the I-9 paperwork for all of the Respondent's approximately 400 employees. Jennifer Harden, a supervisor in the human resources department, and Rias, testified that Harden provided Rias with an alphabetical list of the employees to be audited. According to Rias, she audited the employees in the order in which they appeared on that alphabetical list. The documentary evidence showed, however, that Hill was the very first employee from whom Rias made an email request for I-9 information even though there were seven employees whose names precede Hill alphabetically and from whom Rias subsequently requested information.[3] Indeed, the evidence showed that Rias did not make a single email request for I-9 information from *any* other employee until *after* Hill demanded to know the reason why the information was being requested from him. When Rias was asked to explain why she audited Hill before other employees whose names came ahead of his alphabetically, she responded, "I can't answer that." Neither Rias, nor Harden, nor any other witness for the Respondent, provided an explanation for the discrepancy.[4] In addition, the evidence showed that after requesting the immigration documentation from Hill, Rias requested information from multiple employees whose documentation was already complete and verified.

Harden testified that she made the decision to initiate the immigration/citizenship audit described above because of an industry group's warnings about the necessity of maintaining I-9 documentation and also because one of the Respondent's outside funding sources was preparing to audit the operation. Her testimony about these reasons, however, was decidedly vague. Harden did not state when she received the warning from the industry group or identify that organization. Nor did she identify the outside funding source or pinpoint when she found out about the planned audit other than to say that it was sometime in 2011. She did not reveal what aspects of the Respondent's organization the outside funding source was planning on auditing or whether those aspects related in any way to the immigration or citizenship status of employees.

b. Hill's participation in the investigatory interview regarding Zeh

In July 2011, Newsome obtained information indicating that unit employee Christine Zeh, a therapist in the mother/mad/children (MDC) department, had been engaged in activities for another employer at times when she was using sick

[2] Transcript (Tr.) 8.

[3] Rias requested I-9 information from S. Beckham on July 21, 2011; G. Carson on July 25, 2011; T. Cora on July 22, 2011; M. Dennis on July 22, 2011; K. Dychko on August 4, 2011; L. Glenn on July 22, 2011; and T. Glover on July 22, 2011.

[4] Newsome denied that he directed Rias to request that Hill provide information relating to the I-9 form.

leave from, or otherwise being compensated by, the Respondent. Newsome began an investigation into possible "time theft" by Zeh, and also into the legitimacy of some of her Medicaid billing. As part of that investigation, Newsome interrogated Zeh on July 22, 2011. In addition to Newsome and Zeh, the interrogation was attended by Hill, and by Respondent Officials Tamera Arnold (director of quality improvements) and Deborah Williams (clinical supervisor). Hill was present at Zeh's request.

As Newsome began questioning Zeh, Hill interrupted and asked to know the purpose of the questioning. Both Hill and Newsome testified that clarifying issues for the employee was one of the functions of a union representative during this type of questioning. Hill stated, moreover, that his understanding was that, under *Weingarten*,[5] Zeh was entitled to know what the Respondent was investigating before she submitted to questioning. Newsome responded to Hill's question about the purpose of the interrogation by stating that the Respondent was investigating a possible "conflict of interest." Hill testified that he "had no idea" what Newsome meant by "conflict of interest." As a result, Hill repeatedly requested clarification from Newsome during the interrogation and advised Zeh not to answer certain questions until the Respondent provided clarification. At one point, Hill said that he would not permit Zeh to "incriminate herself," and Newsome opined that the right against self-incrimination did not apply in the context of the Respondent's investigation of Zeh.

During the interview, Newsome never stated to Hill or Zeh that the investigation involved possible "time theft" or Medicaid billing problems. The Respondent's notes of the interrogation state that, at one point, Newsome asked Zeh if she was employed by another entity and Hill told Zeh, "That's none of his business what you do on your time." The notes also state that Newsome alluded to evidence that "on the 27th she punched in, went to orientation [with another employer], came back, punched out." Assuming that these portions of the Respondent's notes are accurate, the record indicates that Newsome's allusions to activities with another employer failed to clarify for Hill that the investigation concerned time theft and billing problems. Indeed, Arnold, a witness for the Respondent, testified that Hill did not appear to understand what the meeting was about. Hill continued to request clarification and told Newsome that Zeh would answer, and make every effort to cooperate, if Newsome explained what the suspected conflict of interest was.

The record shows that the phrase "conflict of interest," as used by the Respondent, refers to a range of conduct that is at once extremely broad and also too narrow to cover the conduct for which Zeh was actually being investigated. Its written policy defines conflicts of interest as: "exploit[ing] relationships for personal or professional gain." (Respondent's Exhibit (R. Exh.) 3 p. 17.) The policy goes on to define that in more detail as: "Receiving gifts or favors from clients, their family members or guardians, vendors or referral sources . . . . Giving gifts to clients, their family members or guardians that could unduly influence their professional or clinical relationship . . . . Soliciting personal business transactions with known clients, their family members or guardians . . . . Encouraging the transfer or referring Murtis Taylor Human Services System clients to a private practice or business in which the employee has a financial interest." (R. Exh. 3 pp. 17 to 18.)

The Respondent's interrogation of Zeh lasted for approximately 60 to 75 minutes, although portions of that time were taken up with private consultation between Zeh and Hill. Ultimately, Zeh answered multiple questions during the interrogation, but also refused to answer other questions, usually, but not always, after Hill advised her not to do so. In some instances, Hill did not address himself to Zeh, but rather told Newsome that Zeh would not answer. During the interrogation, Newsome did not obtain all the information that he was seeking.

The record shows that Hill sometimes used a loud voice during the July 22 interrogation, but not that he engaged in any physically or verbally threatening behavior or that he used any rude, vulgar, or insulting language.[6] At one point, Hill asked Newsome if he was threatening his job, and Newsome responded that if Hill "continued to impede the investigation that he could have problems." Hill testified that at another point during the interrogation, Newsome stated that Hill "would not be here long anyway." The record does not establish what Newsome meant by this statement, but Hill himself testified that Newsome did not threaten his job during the interrogation.

The record shows that Hill attends interrogations of unit employees at the request of the unit employee being questioned and that Zeh, or any other employee who Hill represents, can require him to leave the interrogation at any time. Indeed, Hill was present at the Respondent's interrogation of Charging Party English, but left when English told him to do so. Hill did not have authority to prevent Zeh from answering any question that she wished to answer, nor did he have authority to sanction her for answering questions against his advice. The evidence did not suggest that there were any instances in which Zeh wanted to answer a question, but Hill somehow prevented her from doing so. Similarly, there was no evidence that Zeh ever indicated that she wanted Hill to leave the interrogation or stop representing her. The record does, however, indicate that during the July 22 interrogation Zeh consistently followed Hill's advice when he told her not to answer certain questions.

In the course of the interrogation, Newsome told Zeh that if she declined to answer questions the Respondent would make a decision based on the evidence that it had. Hill testified that Newsome also stated that the Respondent would discharge Zeh if she did not answer his questions, and the Respondent's contemporaneous typed notes provide some support for that testimony. (See R. Exh. 20 at p. 3 (reporting that Newsome stated, "If you continue to impede this investigation any longer I am going to have to discharge [Zeh].")) I find that Newsome not only stated that the Respondent would make a decision without

[5] *NLRB v. J. Weingarten,* 420 U.S. 251 (1975).

[6] Williams testified that, during the meeting, Hill "jumped across in Mr. Newsome's face." Assuming I were to credit this portion of Williams' account, I'm not sure what it means, and find that it does not establish threatening conduct. I note, moreover, that none of the three other witnesses who attended the Zeh interrogation—including the other two who testified on behalf of the Respondent—described any threatening conduct by Hill.

Zeh's input if she continued to refuse to answer questions, but also stated that the Respondent would discharge her if she continued to refuse to answer.

At the end of the interrogation, Newsome repeatedly posed a question to Zeh about work for another employer. After Zeh persisted in refusing to answer that question, Newsome confiscated Zeh's badge and keys. At that point the meeting ended. Newsome testified that Zeh was suspended as of that day, but that he did not tell her she was suspended. Arnold testified that her contemporaneous understanding was that Zeh was discharged when Newsome took her badge and keys. Zeh resigned her position with the Respondent on August 1, 2011, before the Respondent notified her of further action regarding her employment status. The record shows, however, that the Respondent was preparing a discharge notice for Zeh at the time she resigned.

c. Based on Hill's conduct at Zeh's investigation, Respondent suspends and investigates Hill

On August 18, 2011, the Respondent suspended Hill for 10 days without pay, gave him a final warning, and stated that he would be terminated immediately if he "appear[ed] on any organization property" during the 10-day suspension.[7] (General Counsel's Exhibit (GC Exh.) 58 at p. 2; see also Transcript (Tr.) 776 (Newsome states that employees are not permitted to enter any of the Respondent's facilities during the period of a suspension).) In the disciplinary paperwork, the Respondent based this action explicitly, and exclusively, on Hill's conduct while serving as Zeh's union representative at the interrogation on July 22. The written disciplinary notice for this action states: "Mr. Newsome asked Dr. Zeh a series of questions of which many she refused to answer at the advisement of Mr. Hill. Mr. Newsome informed Dr. Zeh and Alton Hill, Union Steward, that refusal to respond to the questions would be considered insubordination and would be considered obstructing an administrative investigation." The disciplinary notice further states that "[a]lthough Mr. Hill was not presented questions to which he personally refused to answer, ... Mr. Hill obstructed an investigation by advising Dr. Zeh to refuse to obey her superior's orders to answer questions and cooperate with the investigation." The notice stated that this conduct by Hill constituted a class III violation, which the Respondent's disciplinary policy states is the "most serious" class of violation and should be addressed by "suspension with final warning and/or termination of employment." According to the notice, Hill's conduct constituted the class III violation of interfering with, or obstructing, "the official duty of an employee," or "the operation of an administrative department or executive office."

Custard and Newsome were the officials who made the decision to suspend Hill for 10 days. Prior to issuing this discipline, the Respondent did not question Hill regarding his conduct or otherwise ask him to explain it. Newsome stated that the purpose of suspending Hill was "to send a message to Mr. Hill as well as any other union representatives" that during an "investigation that that type of behavior would not be allowed, would not be permitted, but put them also on record that they understand that the gravity of such could ultimately . . . lead to discharge." He explained, "We're not necessarily trying to chill if you will their activity from the standpoint of making them active in the process, but we want to make sure that we both want to get to the truth."

At the time Hill was suspended for 10 days, Newsome had never recommended suspending any other employee for more than 5 days and was unaware of any instances in which the Respondent had done so. Custard had never previously approved a suspension as long as Hill's. The record shows that in February 2011, during Newsome's tenure as human resources director, the Respondent suspended other employees for no more than 5 days for conduct that was arguably more serious than anything that Hill did while representing Zeh. The Respondent issued a 5-day suspension to an employee who physically assaulted a coworker. The record evidence suggests that this assault was not related to protected or union activity. Another employee received a 5-day suspension for engaging in argumentative and disruptive behavior that included defying an order from the Respondent's CEO and yelling at other employees.

Based on Hill's actions during the Zeh interrogation, the Respondent not only suspended Hill for 10 days without pay, but also investigated him for Medicaid fraud,[8] searched the files in his office, and then blocked entry to the office with the sort of yellow "caution" tape that one often sees at crime scenes. These actions all appear to have taken place during the period when Hill was suspended. Medicaid fraud generally refers to attempts to bill Medicaid for services that were not actually provided. Hill, Arnold, and Custard all testified that they were not aware of any previous instances in which an employee's office had been taped off as part of a Medicaid investigation, or any other type of investigation. The record showed that in addition to regular work files, Hill's office contained union files. Newsome testified that he generally tried to have a union representative present before searching a unit employee's office, but he conceded that he did not make any effort to have a union representative present when Hill's office was searched. He did not explain this disparate treatment.

The directive to investigate Hill and tape off Hill's office was given by Custard based on the reports he received about Hill's representation of Zeh at the July 22 interrogation. He testified that, as reported to him, Hill's behavior during the Zeh investigation was "unusual" and led him to suspect that "[t]here might be something connected to Hill and [Zeh] in terms of Medicaid fraud." Newsome stated that he had never seen a union representative so "married" to an investigation as Hill had been during the Zeh interrogation, and therefore he "won-

[7] As a result of this, and the fact that the contract negotiations were being held on the Respondent's property, Hill did not fulfill his duties as a member of the Union's bargaining committee during the period of his suspension. The Respondent offered to move the negotiations to a site away from its property, but Hill was not aware of that offer.

[8] Custard testified that the Respondent was conducting an investigation to see if there was evidence that Hill was engaged in Medicaid fraud. Tr. 532–533. Newsome contended that what the Respondent did was not technically a Medicaid fraud investigation, but rather a "survey to find out if any Medicaid fraud could have, may have occurred." Tr. 812–813. I find that the Respondent investigated Hill for Medicaid fraud, whether formally or informally.

dered" whether Hill had "anything to do with" Zeh's suspected misconduct. Custard directed Arnold to "take a look at [Hill's] cases and make sure we d[o]n't have a problem." Arnold stated that Hill's office was searched "to see if there were any blank documents signed by clients"; apparently such documents would be indicative of improper practices. The Respondent expanded the investigation to cover the entire team on which Hill worked, but no one on the team had their office searched or blocked with tape except for Hill.

The Respondent's investigation of Hill found no evidence of Medicaid fraud by Hill or the team he was a part of.

d. Request that Hill produce proof of auto insurance in addition to insurance card

Once every 6 months, the Respondent requires approximately 300 of its employees to submit proof that they have automobile insurance. This is done because the employees sometimes assist clients by driving them to physicians' offices or other locations. The Respondent has a written policy requiring that employees who drive personal vehicles for business purposes "submit evidence of insurance." For well over a decade, the Respondent accepted the automobile insurance card presented by Hill as sufficient evidence of insurance. The Respondent did this even though Hill's insurance card carried the name of Hill's brother, not of Hill himself. Hill testified that the insurance is in his brother's name but that, under the terms of that insurance, both his brother and himself are covered. On August 2, 2011, less than 2 weeks after Hill represented Zeh at the July 22 interrogation, the Respondent for the first time required Hill to provide, in addition to the insurance card, an insurance policy rider showing that he was covered by the policy. The record did not show any other instance in which the Respondent asked an employee to provide an insurance policy rider, but also did not show any other instance in which an employee had submitted an insurance card that did not bear that employee's name.

Newsome is the official who oversees compliance with the automobile insurance requirement. The email request for Hill's insurance policy rider came from Addie Summers, who Newsome described as reporting to him by an organizational "dotted line." Summers is also the administrative assistant to CEO Custard's assistant, and an agent of the Respondent. (Tr. 8.) Summers has been the staff person responsible for obtaining documentation of employees' automobile insurance since 2007. She testified at the hearing, but did not explain why, in August 2011, she broke with longstanding tradition, as well as her own past practice, and declined to accept the insurance card submitted by Hill as adequate documentation of coverage.

Counsel for the Respondent asked Summers if anyone with the Respondent "ever directed you to specifically single out Alton Hill and send him an email requesting his [insurance] rider," and Summers answered, "[N]o." I note, however, that this does not constitute a denial that Hill was singled out for additional scrutiny regarding his automobile insurance, just a denial that anyone specifically directed Summers to request his insurance rider and to do so by email.

Similarly, counsel for the Respondent asked Newsome if he told Summers to send an email to Hill regarding the insurance documentation, and Newsome responded, "I did not. Not directly, no." Newsome attempted to further explain this response, but his testimony on the subject did not include a categorical denial that he directed Summers to single out Hill for scrutiny, but only a denial that he directed her specifically to make an email request for Hill's insurance documentation.

e. Hill is turned away from one of Respondent's facilities

The record shows that, prior to his suspension, Hill was permitted to freely enter any of the Respondent's facilities. On one occasion, after his suspension ended, Hill was on the way to a client's home and stopped at the Respondent's facility in St. Clair, Ohio, to obtain paperwork. Hill was not assigned to that facility, and could have obtained the paperwork at other locations, but he chose the St. Clair location because it was located along the route to his destination. When Hill arrived at the facility, his supervisor was present and denied Hill access to the facility.[9] After Custard learned about this incident, he directed Newsome to issue a memorandum to the Union stating that the Respondent would begin enforcing limitations on employees' access to facilities other than the one to which they were assigned. Hill testified that the only one of the Respondent's facilities that he is now authorized to enter is the one where his office is located. He testified, however, that the episode involving the St. Clair facility was the sole instance in which he actually appeared at one of the Respondent's facilities and was denied access. He testified that the Respondent never prevented him from representing a unit employee. Both Custard and Newsome denied that they had directed anyone to refuse Hill access to facilities of the Respondent, although as stated above, Custard testified that he reacted to Hill's attempts to enter the St. Clair facility by directing Newsome to issue a memorandum to the Union stating that the Respondent would begin enforcing restrictions on access.

In their testimonies, Custard and Newsome indicated that the Respondent began to deny employees entry to facilities other than ones to which they were assigned in order to protect the confidentiality of client files. However, Hill testified that employees were already prohibited from accessing the files of clients with whom they were not working. Indeed, the Respondent did not show that any employee had been violating the rule against accessing the files of clients with whom they

[9] Both Hill and Custard testified that, prior to his suspension, Hill was not restricted from entering any of the Respondent's facilities. Tr. 312–313, 543. Nevertheless, in its brief the Respondent asserts that it "ha[s] a policy of requiring its employees to work at the facility that they have been assigned to, and no work should be performed at another facility unless a client is at the other facility (Policy No. 6049)." R. Br. at 17. However, not only is this assertion contrary to the testimony of Hill and Custard, but the policy cited by the Respondent does not state the restriction claimed by counsel. That policy enumerates over 50 separate prohibitions, but the closest it comes to saying what the Respondent claims it does is a prohibition on "unauthorized absence from work or one's workstation during the workday." That restriction has no application to Hill's attempt to save time by obtaining necessary forms at a company location that was along his route to a work destination, instead of backtracking to his regular workstation to obtain those forms.

were not working. The Respondent did not show that at the time it denied Hill access to the St. Clair location and Custard directed Newsome to issue the memorandum referenced above, management took any other new action to prevent an employee from improperly accessing client files that were kept at the employee's home facility.

f. Hill represents Johnson at interrogation in February 2012

On February 24, 2012, the Respondent interrogated employee Andra Johnson concerning possible client abuse and conflict of interest. Hill served as Johnson's union representative during that interrogation, which was conducted by Newsome, Arnold and Harden. Johnson answered the questions that were posed and the Respondent prepared notes, in question and answer format, of the interview. Johnson was asked to sign those notes, which she did. Unlike the notes of English's March 12 interrogation, which are discussed in some detail later in this decision, the notes of Johnson's interrogation did not have a signature block on each page or any language indicating that the employee's signature was required or would constitute confirmation of the accuracy of the notes.

At one point during the interview, Hill attempted to clarify a question, and this led to an exchange in which Hill stated that it was his right to attempt such clarification and asked whether Newsome was threatening him with another suspension. Newsome stated that he was "not threatening" but "promising."[10] Nevertheless, Hill stated that he was not prevented from saying anything at the interrogation and that management did not prevent him from representing employees at any meeting.

2. Analysis

a. Suspension of Hill

The complaint alleges that the Respondent discriminated in violation of Section 8(a)(3) and (1) by suspending Hill because of his union and concerted activities and to discourage such activities. The Respondent defends its action as being justified by Hill's conduct while serving as Zeh's union representative during the July 22 interrogation. For the reasons discussed below, I conclude that the violation is shown because Hill was engaging in protected activity by serving as Zeh's union representative, and because Hill did not, in the course of that protected activity, engage in conduct that caused him to forfeit the Act's protection. *Fresenius USA Mfg.*, 358 NLRB No. 138, slip op. at 4 (2012).

In *NLRB v. J. Weingarten,* the United States Supreme Court held that Section 7 of the Act, and specifically its guarantee of employees' right to act in concert for mutual aid and protection, protects the right of "union representation at investigatory interviews which the employee reasonably believes may result in discipline against him." 420 U.S. at 260 and 267. The Court observed that union representation at such a meeting is valuable because, inter alia, it "might reasonably be designed to clarify the issues" in a way that the employee being questioned lacks the experience or ability to do. Id. at 260 and 262 fn. 7; see also *Pacific Telephone & Telegraph Co.,* 262 NLRB 1048 (1982) (employer violates the Act by refusing to inform *Weingarten* representative or employee of the nature of the matter being investigated), enfd. in relevant part by 711 F.2d 134 (9th Cir. 1983). In that context, the Court explained, the union representative is protecting not only the individual being questioned, "but also the interests of the entire bargaining unit by exercising vigilance to make certain that the employer does not initiate or continue a practice of imposing punishment unjustly." *Weingarten*, 420 U.S. at 260. To that end, the *Weingarten* representative has the right not only to attend the interview, but also to provide "advice and active assistance" to the employee and "cannot be made to sit silently like a mere observer." *Barnard College*, 340 NLRB 934, 935 (2003); see also *Postal Service*, 288 NLRB 864, 868 (1988) (employer violated Sec. 8(a)(1) by indicating to a *Weingarten* representative who had been interrupting with questions that he should "be quiet and only take notes").

At the same time, the Court attempted to "'strike a balance between the right of employer to investigate the conduct of its employees at a personal interview, and the role of the representative present at such an interview.'" *Postal Service*, 351 NLRB 1226, 1231 (2007), quoting *Southwestern Bell Telephone*, 251 NLRB 612 (1980). The Court created that balance by limiting the right to *Weingarten* representation in a number of specific ways. The employee's right is limited in that it only applies where the employee both requests representation and reasonably believes the interview may lead to discipline. The Court also noted that the *Weingarten* right is limited inasmuch as an employer who considers the participation of a union representative intrusive or unduly adversarial, may lawfully require the employee to choose "between having an interview unaccompanied by his representative, or having no interview" and leaving the employer "free to act on the basis of information obtained from other sources." 420 U.S. at 258–259. In addition, the Court stated that while a union representative may attempt to "clarify the facts or suggest other employees who may have knowledge of them," the employer is "free to insist" on not hearing the accounts of others, but only "the employee's own account." Id. at 260. It will upend the balance struck by the Supreme Court if the Respondent is also given the additional prerogative it seeks here, i.e., to discipline an employee because he or she provides *Weingarten* representation.

In this case, Hill was disciplined for actions he took while engaged in the protected activity of serving as *Weingarten* representative to a unit employee. Zeh requested that Hill represent her, and the interrogation was one at which the possibility of disciplinary action was plainly contemplated. This is exactly the type of situation in which the right to the participation of a union representative is protected under *Weingarten*. Neverthe-

[10] Hill also testified that Newsome repeatedly told him to "shut up" during the Johnson interrogation. Newsome and Harden both denied that Newsome said that, and Arnold testified that she did not remember Newsome doing so. Johnson was not called to testify. Based on my observation of the demeanor of the witnesses, their testimony, and the record as a whole, I do not find a basis for crediting Hill over the Respondent's three witnesses on the question of whether Newsome told Hill to "shut up." However, I credit Hill's testimony regarding Newsome's statement that he was "not threatening" but "promising" inasmuch as that testimony was facially credible and not directly contradicted.

less, the Respondent asserts that under the Board's decision in *Manville Forrest Products*, 269 NLRB 390 (1984), I should find Hill's participation as *Weingarten* representative to be unprotected. In *Manville Forrest*, the Board held that the employer lawfully disciplined a union steward who attempted to prevent three employees from cooperating in an investigation of suspected misconduct by a coworker. The union steward told the three employees not to disclose what they had witnessed, but rather to say that they had not seen or heard anything. I conclude that *Manville* is not relevant to the question of whether Hill's service as *Weingarten* representative was protected. I begin by stating the obvious, i.e., that in *Manville* the Board made no reference to either the W*eingarten* decision or employees' rights under it. It is clear, in fact, that *Weingarten* rights were not implicated at all in the *Manville* case because the three employees who the union steward attempted to influence there were not the employee against whom discipline was contemplated and the decision does not show that any of the three requested the assistance of the union steward. That is a far cry from the *Weingarten* situation, and does not implicate the interests at issue there of providing an inexperienced employee who fears disciplinary action with the assistance of a union representative who can, as Hill was attempting to do here, clarify issues and otherwise advise the employee during an investigatory interview.

Of course the fact that that an employee is acting as a *Weingarten* representative does not mean that he or she cannot be disciplined for engaging in conduct in the course of that representation that is so opprobrious or extreme as to forfeit the protection of the Act. See *Fresenius USA Mfg.*, supra; *Atlantic Steel Co.*, 245 NLRB 814 (1979). Under the Board's decision in *Atlantic Steel*, the determination about whether otherwise protected activity has lost the Act's protection is based on a "careful balancing" of the following four factors:

> (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way, provoked by an employer's unfair labor practice.

245 NLRB at 816. The Board has cautioned that while an employer may lawfully discipline an employee engaged in protected activity for making statements that threaten others with, for example, physical harm, it may not discipline an employee for making statements that simply make others annoyed or uncomfortable. *Chartwells, Compass Group, USA*, 342 NLRB 1155, 1157 (2004); *Alpine Log Homes*, 335 NLRB 885, 894 (2001), *RCN Corp.*, 333 NLRB 295, 300 (2001).

After weighing the *Atlantic Steel* factors, I conclude that the conduct the Respondent points to does not approach being so opprobrious as to cause Hill to forfeit the protection of the Act. His conduct occurred at a meeting that was attended only by Hill, Zeh, and three representatives of management. In such an environment, Hill's statements, even when made in a loud voice, would not be expected to unduly disrupt the work of uninvolved employees or undermine the authority of the managers. Therefore, the first *Atlantic Steel* factor—location—weighs in favor of finding that Hill's conduct retained the Act's protection. The subject matter of the discussion also supports continued protection. Hill's statements during the interview on July 22 related to the investigation itself. Hill was not shown to have veered into unrelated and/or improper subjects. Unlike the union representative in *Manville Forrest*, supra, upon which the Respondent relies, Hill was not shown to have tried to persuade Zeh to untruthfully deny knowledge of relevant matters. Rather, he advised her to refrain from answering certain questions while he attempted to clarify the issues being investigated. The subject matter of Hill's statements—i.e., an attempt to "clarify the issues"—was central to Hill's role as *Weingarten* representative. The third *Atlantic Steel* factor, "the nature of the outburst," also weighs against finding that Hill's conduct was so opprobrious as to lose its protected status. Hill was sometimes loud, but did not threaten anyone either verbally or physically, or use abusive or otherwise inappropriate language. The evidence shows that Hill was forceful in his representation of Zeh, but not that he was unduly adversarial. To the extent that the interrogation was contentious, this was so because of a dispute over the extent of the Respondent's obligation to clarify the subject matter of the questioning. In addition, the evidence did not show that Hill took any action to stop Zeh from answering a question that she, contrary to his advice, sought to answer.

The fourth *Atlantic Steel* factor looks at whether the "outburst" was provoked by an unfair labor practice. Hill's conduct in this case was a response to the Respondent's refusal to clarify the nature of the conduct for which Zeh was being investigated. Although there is some legal support for the proposition that an employer commits an unfair labor practice by refusing to inform a *Weingarten* representative of the nature of the matter being investigated, see *Pacific Telephone & Telegraph*, supra, such a violation was not alleged in this case and I reach no conclusion as to whether or not the Respondent's refusal to further clarify the subject of the investigation amounted to an unfair labor practice. Assuming that Hill's conduct was not provoked by an unfair labor practice, I find that this factor is either neutral or leaning so slightly in the Respondent's favor as to be easily outweighed by the three factors supporting continued protection. I note that Hill's statements regarding whether Zeh should or would answer certain questions, even when facially addressed to Newsome, were just as much in the nature of advice to Zeh. Under circumstances where the employee's message is directed towards coworkers rather than supervisors, the Board has held that "the lack of employer provocation neither weighs in favor of nor against finding the conduct protected." *Fresenius*, supra, slip op. at 7. Based on consideration of all the relevant factors, I find that Hill's activity as Zeh's *Weingarten* representative was protected activity, and that Hill did not engage in any conduct in the course of that activity which, under *Atlantic Steel*, was sufficiently extreme to deprive him of the Act's protection. Therefore, the Respondent violated Section 8(a)(3) and (1) by suspending Hill for 10 days based on his representation of Zeh at the July 22, 2011 investigatory interview.

In its brief, the General Counsel analyzes the allegation regarding Hill's suspension under the burden shifting approach set forth in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462

U.S. 393 (1983).[11] However, it is clear that the *Wright Line* analysis "is inapplicable where, as here, an employer undisputedly takes action against an employee for engaging in protected conduct; in such cases, the inquiry is whether the employee's actions in the course of that conduct removed the employee from the protection of the Act." *Fresenius*, supra, slip op at 4 fn. 7. At any rate, I find that even if the record evidence is analyzed under *Wright Line*, instead of *Atlantic Steel*, a violation is shown.[12] In that mode of analysis, the General Counsel bears the initial burden of showing that the Respondent's decision to take adverse action against an employee was motivated, at least in part, by antiunion considerations. *Camaco Lorain Mfg. Plant*, 356 NLRB No. 143, slip op. at 4 (2011). Antiunion animus may be inferred from the record as a whole, including disparate treatment and timing. Id.[13] If the General Counsel establishes discriminatory motive, the burden shifts to the employer to demonstrate that it would have taken the same action absent the protected conduct. Id.; *ADB Utility Contractors*, 353 NLRB 166, 166–167 (2008), enf. denied on other grounds, 383 Fed. Appx. 594 (8th Cir. 2010); *Intermet Stevensville*, 350 NLRB 1270, 1274–1275 (2007); *Senior Citizens Coordinating Council*, 330 NLRB 1100, 1105 (2000).

In this case, the General Counsel has met the initial burden of showing that antiunion motivation played a part in the decision to suspend Hill. The Respondent based that disciplinary action on Hill's representation of Zeh pursuant to the protections set forth in *Weingarten*, supra. Moreover, Newsome admitted that the Respondent took the actions it did against Hill to "send a message to Mr. Hill as well as *any other union representatives*"—not, in other words, to vindicate standards applicable to all employees involved in investigations, and not simply to mete out appropriate discipline to Hill. I was also struck by Newsome's equivocal testimony about whether the suspension was designed to chill union activity. Rather than assert that a desire to chill union activity played no part in the Respondent's suspension decision, Newsome stated that the suspension decision was "not necessarily" an attempt to chill union representatives' activity. Although the above evidence is sufficient to establish that antiunion motive played a part in the Respondent's decision to suspend Hill, I also find that some additional support for that finding is provided by evidence of disparate treatment and timing. The evidence shows that when Newsome recommended the 10-day suspension for Hill, he was not aware of the Respondent having imposed so lengthy a suspension on any other employee *ever*. Moreover, Hill's suspension was the first time since Custard became CEO in 2010 that Custard approved a suspension as long as 10 days. In fact, the evidence showed that during Custard's and Newsome's tenures, a significantly shorter suspension was issued to an employee who physically assaulted a coworker, but whose misconduct was not connected to union or protected activity. Such "disproportionately harsh" punishment "suggest[s] an illicit motive." *New Era Cap Co.*, 336 NLRB 526, 527 (2001). Moreover, the timing of the suspension—during a 2-month period when Hill was subjected to a barrage of intimidating conduct by the Respondent—also tends to support the view that a desire to, in Newsome's words, "send a message" to "union representatives" was a motivating factor for Hill's suspension. The Respondent's conduct against Hill during July and August 2011 included requesting immigration/citizenship status documentation that it had never previously required from him, requesting automobile insurance documentation that it had never previously required from him, investigating Hill for Medicaid fraud (ultimately finding no evidence of it), and searching Hill's office and blocking entry to it with yellow "caution" tape.

The burden therefore shifts to the Respondent to show that it would have taken the same action for nondiscriminatory reasons absent Hill's protected conduct. The Respondent argues that it lawfully took the action because Hill interfered with the investigation of Zeh. However, as is discussed fully above, the "interference" pointed to by the Respondent was itself protected activity under *Weingarten*. Since the conduct relied on by the Respondent to justify the discipline was itself protected activity, that conduct cannot logically meet the Respondent's burden of showing that it would have taken the same action absent Hill's protected conduct.

For the reasons discussed above, I conclude that the Respondent discriminated in violation of Section 8(a)(3) and (1) by issuing a 10-day suspension to Hill because of his representation of Zeh on July 22, 2011.

b. The Respondent investigates Hill for fraud

The General Counsel alleges that the Respondent harassed Hill in violation of Section 8(a)(1) by launching a Medicaid fraud investigation against him, searching his office, and blocking entry to his office with "caution" tape, all because of Hill's representation of Zeh at the July interrogation. An employer violates Section 8(a)(1) when it subjects an employee to an investigation, and possible discipline, based on the employee's conduct in the course of protected activity. *Consolidated Diesel Co.*, 332 NLRB 1019, 1020 (2000), enfd. 263 F.3d 345 (4th Cir. 2001); see also *AM Property Holding Corp.*, 350 NLRB 998, 1042–1043 (2007) (employer violates Sec. 8(a)(1) and (4) when, during a Board hearing, it threatened to investigate an employee-witness' immigration status). In this case, the Respondent admits that because of Hill's conduct while serving as Zeh's *Weingarten* representative, it investigated him for Medicaid fraud, an action which could have led to discipline if wrongdoing was found. The investigation included searching Hill's office, and blocking the entryway with yellow "caution" tape. As discussed above, Hill's representation of Zeh was pro-

[11] The Respondent's legal analysis of Hill's suspension relies primarily on *Manville Forrest Products*, supra.

[12] The evidence regarding the claim that Hill was unlawfully suspended was fully developed regardless of whether that claim is analyzed under the *Atlantic Steel* factors, or under the *Wright Line* framework.

[13] The Board has made clear that timing is an important factor in assessing motivation in cases alleging discrimination based on union or protected activity. See, e.g., *LB&B Associates, Inc*., 346 NLRB 1025, 1026 (2005), enfd. 232 Fed. Appx. 270 (4th Cir. 2007); *Desert Toyota*, 346 NLRB 118, 120 (2005); *Detroit Paneling Systems*, 330 NLRB 1170 (2000), enfd. sub nom. *Carolina Holdings, Inc. v. NLRB*, 5 Fed. Appx. 236 (4th Cir. 2001); *Bethlehem Temple Learning Center*, 330 NLRB 1177, 1178 (2000); *American Wire Products*, 313 NLRB 989, 994 (1994).

tected activity and since Hill did not, in the course of that protected activity, engage in conduct that caused him to forfeit the Act's protection, the Respondent violated the Act by subjecting him to an investigation and potential discipline based on the protected activity. *Consolidated Diesel*, supra; *Atlantic Steel*, supra.

As with the violation regarding the Respondent's suspension of Hill, the violations regarding the investigation of Hill are established without reference to the *Wright Line* burden shifting analysis since the Respondent indisputably took the action based on Hill's conduct while engaged in the protected activity of serving as *Weingarten* representative. See *Fresenius*, supra, slip op. at 4 fn. 7. However, even if the evidence is evaluated under *Wright Line*, the violations are established. The General Counsel meets its initial burden of showing that antiunion motivation played a part in the challenged investigation for the same reasons as discussed regarding the suspension—i.e., the Respondent expressly took the action based on Hill's conduct while acting as *Weingarten* representative, and Newsome's testimony that he took action against Hill in order to "send a message" to "union representatives." Evidence of disparate treatment also suggests to me that antiunion animus motivated the investigation. Specifically, the testimony showed that before Newsome searched an employee's office he generally gave the Union the opportunity to have a representative present, but that he did not extend that opportunity to the Union before searching Hill's office. See *Relco Locomotives, Inc.*, 358 NLRB No. 37, slip op. at 14 (2012) (evidence of "departures from past practices" supports an inference of "animus and discriminatory motivation.")

In addition, the evidence showed that although the Respondent has searched employee offices before, Hill's was the first to which the Respondent blocked entry with yellow caution tape. That action would reasonably discourage other union activity by showing that such activity might lead to an investigation and to the employee's office being treated like a crime scene. The Respondent has not met its responsive burden under *Wright Line* of showing that it would have investigated Hill for Medicaid fraud even absent his protected activity. Indeed, the Respondent admits that it investigated Hill because of his conduct while serving as Zeh's *Weingarten* representative—conduct which, as discussed above, was protected by the Act. I also reject, as a matter of both fact and law, the Respondent's defense that Hill's zealous representation of Zeh reasonably caused the Company to fear that Hill was involved in Zeh's suspected fraud. The evidence shows that Hill worked on the Respondent's intensive team, while Zeh worked for the MDC unit. The Respondent does not attempt to explain how or why Hill would have involved himself in the billing and timekeeping fraud of an employee in another group. Moreover, permitting an employer to launch an investigation against a *Weingarten* representative just because the representative is more zealous in carrying out his *Weingarten* duties than the employer is comfortable with would have a profound chilling effect on such representation and would unacceptably undermine the rights guaranteed by *Weingarten*. See *Chartwells,* 342 NLRB at 1157 (employer may not lawfully discipline an employee engaged in protected activity simply because that activity makes others annoyed or uncomfortable).

The Respondent makes a number of arguments against finding that its investigation of Hill violated the Act. First it argues that none of the actions it took constitute adverse action. However, when the allegation is that an employer attempted to improperly discourage Section 7 activity by harassing employees in violation of Section 8(a)(1)[14] it is not necessary, as it would be in the case of an 8(a)(3) allegation, to show adverse action in the sense of discipline or other steps that affect the discriminatee's tenure or terms of employment. It is enough that, because of his or her protected activity, the individual was subjected to an investigation that could have led to discipline. *Consolidated Diesel*, 332 NLRB at 1020; see also *American Red-Cross Missouri-Illinois Blood Services Region*, 347 NLRB 347, 349 (2006) (applying *Wright Line* analysis and finding that employer violated Sec. 8(a)(1) when it subjected a union supporter to a lengthy meeting with several managers who read a manual aloud and asked the union supporter questions). The Respondent also argues that investigating possible Medicaid fraud and searching employees' offices were actions it had a right to do and had done numerous times in the past. That may be true, but the fact that an employer has a legitimate policy allowing it to investigate employees does not mean that it may investigate them because they engage in protected activity. *Consolidated Diesel*, 332 NLRB at 1020.

I find that the Respondent violated Section 8(a)(1) in about August 2011 by investigating Hill for Medicaid fraud, searching his office, and blocking entry to his office, all because of his protected activity while serving as *Weingarten* representative for Zeh on July 22.

c. Discharge threats

The General Counsel alleges that the Respondent also violated Section 8(a)(1) during the July 22, 2011 investigatory interview by threatening Hill and Zeh with discharge. As discussed above, the evidence does not establish, as a factual matter, that the Respondent threatened Hill with discharge during that interview. The evidence regarding threats to Zeh is another matter. During the course of the July 22 interview, Newsome stated that if Zeh continued to follow Hill's advice and refuse to answer questions the Respondent would have to discharge her. I find that the Respondent violated the Act by making that statement. Under *Weingarten*, an employee, as a condition of submitting to an interview that may result in discipline, is entitled to information about the nature of the matter being investigated. *Pacific Telephone & Telegraph Co.,* 262 NLRB at 1048. The Respondent improperly interfered with that right by threatening to discharge Zeh for attempting to exercise it. Arguably under *Weingarten*, the Respondent would have been acting within its rights if Newsome had simply said, as he did at another point during the interview, that if Zeh followed Hill's advice not to answer certain questions the Respondent would make a decision based on the information it obtained from oth-

[14] Sec. 8(a)(1) of the Act makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of" the rights to engage in protected union and concerted activity.

er sources. *Weingarten*, 420 U.S. at 258–259 (Employer may lawfully require the employee to choose "between having an interview unaccompanied by his representative, or having no interview," and leaving the employer "free to act on the basis of information obtained from other sources."). However, Newsome went further in that he did not merely state that the Respondent would base a decision about discipline on information from other sources, but also threatened to discharge her for attempting to clarify the subject of the investigation pursuant to *Weingarten*.

I find that the Respondent violated Section 8(a)(1) by threatening Zeh with discharge at the July 22, 2011 investigatory interview.

d. Request for documentation of Hill's immigration status

Hill is a longtime employee of the Respondent and a United States citizen. The evidence shows that in a July 18, 2011 email, the Respondent directed Hill to, by the following day, provide the Respondent with a copy of his social security card and birth certificate in order to document his immigration status. The General Counsel alleges that the Respondent violated Section 8(a)(1) on July 18, 2011, by discriminatorily requesting this information from Hill because he engaged in union and/or protected concerted activity. Since this allegation turns on questions of the Respondent's motivation for its action, the *Wright Line* mode of analysis is applicable. *American Red Cross Missouri-Illinois Blood Services Region*, 347 NLRB at 349 ("The Board applies the *Wright Line* framework to alleged violations of Section 8(a)(1) that turn on employer motivation."). The General Counsel may meet its initial burden of showing that antiunion motivation played a part in the decision by showing that: (1) the employee engaged in union or other protected activity, (2) the employer knew of such activities, and (3) the employer harbored animosity towards the Union or union activity. *ADB Utility Contractors*, supra; *Intermet Stevensville*, supra; *Senior Citizens Coordinating Council*, supra.

The first two elements of the General Counsel's initial showing are met here since Hill was one of four union delegates, he filed grievances on behalf of unit employees, he represented employees during multiple employer investigations, and he was a member of the union bargaining committee for a new contract—all activities about which the Respondent undoubtedly was aware. I also find that the third element of the General Counsel's initial burden—that the Respondent bore antiunion animus—was shown. As discussed above, at approximately the same time as the Respondent requested Hill's immigration documentation, the Respondent unlawfully suspended Hill in order to "send a message" to Hill and other union representatives. The Respondent also discriminatorily launched a fraud investigation against Hill. I find that this contemporaneous, unlawful, antiunion conduct demonstrates that the Respondent bore animus towards Hill's union activity and was engaged in a campaign to chill that activity. The General Counsel has met its initial burden.

Since the General Counsel has made the required initial showing, the burden shifts to the Respondent to show that it would have taken the same action even absent Hill's protected activity. Harden claimed that the Respondent requested the information from Hill as part of a general audit of employees' immigration documentation and that the audit was motivated by warnings from an industry group and by concern that an outside funding source was planning to evaluate the Respondent. I find that this nondiscriminatory justification for the Respondent's action is not credible based on the record as a whole. I note, first, that the testimony was very vague regarding the communications that supposedly caused the Respondent to perform an audit of the immigration/citizenship documentation of 400 employees. Harden did not identify either the industry group or the outside funding source, nor did she pinpoint when the Respondent supposedly received the referenced warning and information. Second, the evidence shows that the Respondent's own policies on immigration documentation require it to obtain documentation of immigration/citizenship status from new and rehired employees, but not from individuals who, like Hill, are incumbent employees. Third, and most telling, is the fact that at the time when the Respondent requested the immigration/citizenship documentation from Hill, it had not requested such documentation from a single one of the hundreds of other employees who were covered by the supposed audit. Indeed it was not until after Hill demanded to know why the Respondent was requesting the information from him that the Respondent made a similar request to any other employee. Rias, the employee who performed the audit could not explain why this was so. Indeed, her account of the audit process was entirely at odds with Hill receiving the first request. Specifically, Rias testified that she performed the audit in alphabetical order, using an alphabetical list provided to her by Harden. However, after requesting the documentation from Hill, Rias made similar requests to seven other employees whose names came before Hill's alphabetically. In addition, the evidence showed that as part of the audit, the Respondent requested information from several individuals whose documentation was already complete and verified. These anomalies were not explained by any of the Respondent's witnesses. Based on the above evidence, I find that the Respondent has failed to show that it would have asked Hill to provide documentation regarding his immigration/citizen-ship status on July 18, 2011, if not for its antiunion motivation. Rather the evidence supports a reasonable inference that the Respondent singled Hill out, and when questions arose about its action, hastily requested information from others in hopes of creating the appearance that management was acting pursuant to a general, nondiscriminatory, audit.[15]

I find that the Respondent violated Section 8(a)(1) on July 18, 2011, when, because of Hill's union and protected concerted activities it required him to provide documentation to confirm his immigration and/or citizenship status.

[15] For the same reason discussed with respect to the Respondent's discriminatory investigation of Hill, I reject the Respondent's contention that its documentation requests to Hill, even if discriminatory, were not "adverse actions" and therefore cannot be found to violate the Act. An employer's discriminatory conduct need not rise to the level of an adverse action in order to constitute a violation of Sec. 8(a)(1). See, e.g., *AM Property Holding Corp.*, 350 NLRB at 1043, *American Red-Cross Missouri-Illinois Blood Services Region*, 347 NLRB at 349, and *Consolidated Diesel*, 332 NLRB at 1020.

e. Request that Hill provide automobile insurance declarations pPage

Newsome is the official who oversees employee compliance with the Respondent's requirement that employees provide evidence of automobile insurance. On August 2, 2011—less than 2 weeks after Hill served as *Weingarten* representative for Zeh, the Respondent, by administrative assistant Summers, required Hill to supply it with the automobile insurance declarations page showing that the insurance covered him. For many years prior to this, including the approximately 4 years during which Summers had been responsible for requesting the necessary documentation, the Respondent always accepted the automobile insurance card submitted by Hill as adequate proof of current insurance.

I find that the evidence presented meets the General Counsel's initial *Wright Line* burden of showing that the Respondent required Hill to provide a copy of the insurance declarations page, at least in part, because of antiunion animus. This is based on much of the same evidence that was discussed above regarding Respondent's unlawful suspension and investigation of Hill, and its unlawful requirement that he provide documentation of his immigration/citizenship status. In particular, the record shows that the Respondent was aware of Hill's activities on behalf of the Union and had decided to "send a message" about such activities to union representatives. In addition, the suspicious timing of the Respondent's departure from its prior practice—occurring less than 2 weeks after Hill's protected activity during Newsome's contentious interrogation of Zeh—points to an unlawful motive to chill employees' union and protected concerted activity. See, supra, footnote 13. This is especially true given that, as discussed above, the Respondent has demonstrated a willingness to punish Hill for that protected activity by suspending and investigating him.

The Respondent has failed to meet its responsive burden under *Wright Line* of showing that it would have required Hill to produce the insurance declarations page absent antiunion motivation. Indeed, as noted in the findings of fact above, neither Newsome nor Summers categorically denied that Hill was being singled out for additional scrutiny because of his protected activity. Moreover, the Respondent does not explain why it departed from its years-long practice of accepting Hill's insurance card as adequate documentation of coverage. This unexplained departure from past practice, coming when it did, supports an inference of animus and discriminatory motivation. See *Relco Locomotives, Inc.*, 358 NLRB No. 37, slip op. at 14. I recognize that an employer whose employees operate private vehicles as part of their job duties may have a legitimate interest in confirming that those employees are covered by automobile insurance, but given the record here I find that the Respondent did not make the request for Hill's insurance declaration page based on such interest, but rather based on its hostility towards, and desire to discourage, Hill's union and protected concerted activities.

I find that the Respondent violated Section 8(a)(1) on August 2, 2011, when, because of Hill's union and protected concerted activities, it required him to provide the declaration pages for his automobile insurance.

f. Denial of access to the Respondent's facilities

The General Counsel alleges that the Respondent violated Section 8(a)(1) when, upon Hill's return from the 10-day suspension, management restricted his ability to access facilities of the Respondent other than the one where his workstation was located. The Respondent operates from approximately 12 buildings in the Cleveland area and the evidence shows that, prior to Hill's suspension, Hill and other union representatives were permitted to freely access any of the Respondent's facilities. When he returned from his suspension, Hill attempted to enter the Respondent's facility at St. Clair, Ohio, which was not the facility where he had his office. Hill was met at the St. Clair facility by his supervisor, who refused to allow him to enter. When Custard learned about this incident he directed Newsome to issue a memorandum to the Union stating that the Respondent would begin enforcing restrictions on employee access to facilities other than the one to which they were assigned. Hill is now permitted to access only the facility where his workstation is located.

I conclude that the evidence meets the General Counsel's initial *Wright Line* burden. As discussed above, the Respondent was aware of Hill's various activities on behalf of the Union and shortly before announcing the new restriction, it had taken unlawful action against Hill to punish, and discourage, those protected activities. In addition, the timing of the Respondent's decision to limit employee access to its facilities is suspicious, coming as it did at the end of the Respondent's unlawful suspension of Hill and indisputably triggered by Hill's attempt to enter the Respondent's St. Clair facility. See, supra, footnote 13.

I find that the Respondent has not met its responsive burden of showing that it would have imposed the access restrictions if not for the antiunion motivation. The Respondent attempts to carry that burden by referencing company policy number 6049, which, it asserts, prohibits employees from going to facilities other than the one to which they have been assigned unless a client is at the other facility. However, that policy states no such prohibition. See, supra, footnote 9. Moreover, even assuming that such a prohibition existed, Custard himself conceded that it was not being enforced, and that the resumption of enforcement of limits to access was triggered by Hill's attempt to enter the St. Clair facility. The Respondent's action in discriminatorily imposing restrictions on Hill because of his union and concerted protected activities would reasonably be expected to discourage Hill's, and other employees', exercise of their Section 7 rights. This is especially true when considered in the context of the Respondent's extensive campaign to chill Hill's protected activities.

I find that the Respondent discriminated in violation of Section 8(a)(1) when, after Hill's suspension, it restricted him from entering any of the Respondent's facilities with the exception of the one where his workstation was located.

C. Alleged 8(a)(5) and (1) Violation Based on Gift Card Incentive

The complaint alleges that the Respondent violated Section 8(a)(5) and (1) when on about January 31, 2012, it unilaterally implemented an incentive award program, and dealt directly with unit employees regarding that program.

1. Facts

The prior collective-bargaining agreement between the parties provided for a companywide incentive program under which employees would receive payments for reaching specified productivity goals. Apart from that incentive program, but while it was in effect, Yvette Edwards, a supervisor with the Respondent, would sometimes give the 15 unit employees who she supervised small gifts—including toiletry products and gift cards. The record does not firmly establish the cost range for these gifts, but the information that was provided showed gifts costing between about $4 and $6 per employee. Edwards paid for these gifts using her own money and, on at least one occasion, she informed the employees of this. Edwards sometimes gave the gifts to all her supervisees, but in one instance she offered the gift only to those who succeeded in reaching a superior productivity level. Edwards did not provide the Union with notice or an opportunity to bargain before making these gifts.

The companywide incentive plan was discontinued when the current collective-bargaining agreement went into effect on November 1, 2011. Moreover, a memorandum of understanding executed as part of the agreement states that "[b]efore initiating a new incentive plan management will discuss the provisions of the plan before its implementation with the Union leadership." The record shows that in about January 2012, while no companywide incentive plan was in effect, Edwards informed her supervisees that any of them who reached a monthly benchmark of 110 productive hours (a level 10 hours above the standard requirement) would receive a $25 Visa gift card. Initially, Edwards proposed a lower dollar amount for the gift card, but after discussions with the employees she raised it to $25. One employee reached the 110-hour benchmark and Edwards provided that employee with a $25 gift card. Under the companywide incentive plan that the parties recently agreed to discontinue, employees would have qualified for employer-provided incentive payments if they reached the same 110-hour benchmark. Prior to offering and dispensing the $25 gift card, Edwards did not provide the Union with notice or an opportunity to bargain. She testified that she offered the card because of her perception that morale was low among her supervisees, and that she offered it without consulting with any other company official.

Edwards participated in the bargaining for the current agreement and was aware that there was no longer a negotiated companywide incentive plan. Edwards own performance is evaluated based in part on whether her team reaches productivity goals.

2. Analysis

The General Counsel alleges that Edwards' conduct violated Section 8(a)(5) and (1) of the Act because she made a unilateral change without prior notice to the Union and because she dealt directly with bargaining unit employees. An employer violates Section 8(a)(5) and (1) of the Act when it makes a unilateral change regarding a mandatory subject of bargaining. *NLRB v. Katz,* 369 U.S. 736 (1962); *Whitesell Corp.*, 357 NLRB No. 97, slip op. at 53 (2011); *Ivy Steel & Wire, Inc.,* 346 NLRB 404, 419 (2006); *Mercy Hospital of Buffalo,* 311 NLRB 869, 873–874 (1993); *Associated Services for the Blind,* 299 NLRB 1150, 1164–1165 (1990). Wage incentive programs are a mandatory subject of bargaining. *Johnson-Bateman Co.*, 295 NLRB 180, 182 (1989). Nevertheless, an employer may dispense "mere gifts" to employees without bargaining, where those gifts are given to all employees without regard to performance or production, and are unrelated to wages or other employment factors. *North American Pipe Corp.*, 347 NLRB 836, 837–838 (2006); *Benchmark Industries*, 270 NLRB 22 (1984), affd. 760 F.2d 267 (5th Cir. 1985).

In this case, Edwards offered the Visa card only to the employees who reached a previously stated productivity benchmark, and thus it does not qualify, under *North American Pipe* and *Benchmark Industries*, as a "mere gift" about which bargaining is not required. I note, moreover, that the Respondent has not shown that the gift was a continuation of the status quo. Although, Edwards had previously given various items to her supervisees, the record does not show that any of those were worth more than a fraction of the value of the Visa card or were linked to the same 110-hour productivity benchmark. Indeed, Edwards' prior rewards to employees were shown to be linked to performance or productivity in only a single instance. Even if one assumes that Edwards' prior performance-related reward was substantially the same as the Visa card awarded here, a single prior incentive award would not be enough to establish the existence of status quo under which the Visa card incentive award in this case could fall. An established practice permitting future actions exists only where the practice is longstanding. *Covanta Energy Corp.*, 356 NLRB No. 98, slip op. at 10 fn.19 (2011). I note, moreover, that the Visa card's higher value and the productivity benchmark for obtaining it indicate that, if anything, Edwards' action was not a valid continuation of her prior gift giving, but an attempt to replace the companywide incentive plan that was linked to the same monthly benchmark, but which the parties had agreed to discontinue under the collective-bargaining agreement. Before introducing the new incentive program, the Respondent did not give the Union notice and an opportunity to bargain nor did it, as the memorandum of understanding required, "discuss" the change with the union leadership.[16]

[16] The Respondent states that it should not be required to provide the Union with notice and opportunity to bargain regarding the new incentive program, but only to notify and discuss it with the Union as required by the memorandum of understanding. Although the memorandum requires the Respondent to discuss such a change with the Union, it does not include any management-rights language that relieves the Respondent of also complying with its statutory obligation to bargain. Thus, I conclude that the contractual requirement that the Respondent discuss incentive plans with the Union is in addition to, not instead of, the statutory requirement that the Respondent give the Union notice and an opportunity to bargain.

For the reasons discussed above, I find that the Respondent, by Edwards, violated Section 8(a)(5) and (1), in or about January 2012, by implementing a new incentive program for unit employees without providing the Union with notice and an opportunity to bargain.

In addition, I find that Edwards' action violated Section 8(a)(5) and (1) because she dealt directly with employees about the new incentive program. As noted above, Edwards had originally offered a lower dollar amount for the gift card, but after employees asked for higher values, Edwards agreed to increase the dollar amount. The Union was not included in these discussions. Direct dealing in violation of Section 8(a)(5) and (1) is shown where the Respondent communicates with represented employees for the purpose of establishing conditions or making changes regarding a mandatory subject of bargaining and does so to the exclusion of the Union. *Permanente Medical Group*, 332 NLRB 1143, 1144–1145 (2000); *Southern California Gas Co.,* 316 NLRB 979, 982 (1995); see also *Allied Signal, Inc.*, 307 NLRB 752, 753 (1992) ("Direct dealing need not take the form of actual bargaining."). That is what Edwards did in this case, and thus her actions violated Section 8(a)(5) and (1) for that reason as well.

D. Alleged 8(a)(5) and (1) Violation Based on Assignment of Nonmedicaid Caseload

The complaint alleges that, in about March 2012, the Respondent violated Section 8(a)(5) and (1) when, without the Union's consent, it failed to continue in effect all the terms and conditions of the collective-bargaining agreement by involuntarily reassigning unit employees to the new position of non-Medicaid funded caseworker.

1. Facts

The Respondent's caseworkers assist clients with functions that those clients, due to mental illness, are unable to perform on their own. This assistance includes helping clients to, inter alia, take medications, make/obtain adequate meals, shower or bathe regularly, find housing, keep medical or mental health appointments, and obtain various community services and benefits. The written job description for the caseworker position lists the following as "essential duties and responsibilities" of the position: "treatment/service planning"; "crisis stabilization"; "family and significant other support"; "individual interventions, symptom monitoring, and self-management"; "procurement and maintenance of essential community resources"; "hospital-based interventions"; "client self determination"; "community outreach and accessibility"; "record keeping and documentation"; "supervision and team meetings." Procurement and maintenance of essential community resources is further defined in the job description as: "Provides direct assistance in obtaining and retaining community resources that include entitlements (Medicaid, Medicare, etc.), housing, vocational training, food, and other basic resources. Helps clients to access resources from other agencies and organizations. Makes referrals, ascertains linkage, and advocates for resources when barriers are encountered."

The Respondent is reimbursed for the services provided by its caseworkers based on the documentation of billable services that the caseworkers submit. The single largest source of reimbursement is Medicaid insurance, however, some of the Respondent's clients have not been determined to be Medicaid eligible and the budget for providing services to such clients must come from other sources. The Respondent can exhaust the annual budget for these non-Medicaid clients before the end of the year. In one recent year, the Respondent actually exceeded its non-Medicaid budget by about $100,000. In an effort to avoid exceeding its non-Medicaid budget, the Respondent tracks how much of the annual non-Medicaid budget has been exhausted, and, if necessary, take steps to ration the caseworker services it provides to non-Medicaid clients.

Prior to March 2012, the Respondent's Medicaid and non-Medicaid cases were spread among the caseworkers. The number of Medicaid clients far outnumbers the number of non-Medicaid clients[17] and the record indicates that the non-Medicaid clients constituted a relatively small portion of the approximately 35 to 50 clients assigned to each caseworker prior to March 2012. At a February 13, 2012 meeting between labor and management, the Respondent announced its intention begin assigning nearly all of the non-Medicaid cases to eight caseworkers who would work almost exclusively with non-Medicaid clients. The Respondent's hope was that by concentrating the non-Medicaid work with this small group of caseworkers, it would be possible to better monitor and manage the budget for non-Medicaid clients. Hill was present at the February 13 meeting and took the position that by reassigning some unit employees from mixed Medicaid/non-Medicaid caseloads to exclusively non-Medicaid caseloads, the Respondent was creating the new position of non-Medicaid caseworker and should fill that position using the posting procedure that is set forth in the collective-bargaining agreement. Hill testified that it is important to treat this as a new position because, under applicable contract provisions, an employee who switches to a new position with the Respondent has the right to return to the prior position if he or she fails to perform satisfactorily in the new position during a probationary period. However, an employee who is assigned different work, but not a new position, may be terminated for failure to perform that assignment adequately, without having the right to return to his or her prior assignment. At the February 13 meeting, Management Official Edwards responded to Hill's concerns by stating that "it wasn't a new position, that they would be providing the same services, it's just the payer source is different" meaning that the services would be paid for out of a "different pot of money." Brown was also present and expressed the view that the Respondent did not have to post the non-Medicaid assignment because it was not a new position. At trial, Custard testified that whether clients are Medicaid or non-Medicaid is just a matter of the funding source, and does not change the caseworkers' duties or responsibilities with respect to their clients.

Starting sometime in March, the Respondent began assigning non-Medicaid cases to a group of approximately five to eight caseworkers, and did so without posting the assignment as a new position, or giving the Union an opportunity to bargain over the pay these employees would receive or any other aspect

[17] The Respondent has about 6000 clients and about 700 of those are non-Medicaid.

of the assignment. One or more of these caseworkers volunteered for the non-Medicaid caseload, but the Respondent also assigned the new caseload to other caseworkers who had not volunteered. The compensation and benefits received by these caseworkers remained the same.

Several contract provisions are relevant to the question of whether the Respondent had the authority to assign the non-Medicaid caseloads in the manner that it did. The collective-bargaining agreement[18] includes a management rights provision that has the following language:

> Except as limited by the terms of the Agreement, the exclusive rights of management include but are not limited to the right to hire, layoff, promote, assign duties to, transfer, discipline or dismiss employees, to introduce new, or improved methods or facilities, to contract work out, and to carry out the ordinary and customary functions of management.
>
> All the rights, power, discretion and authority possessed by the Employer not inconsistent with this Agreement are retained by the Employer and remain exclusively and without limitation within the rights of the Employer.

(R. Exh. 19 at p. 10, sec. 3.1.) The agreement also states that "[i]f the Employer substantially increases the job responsibilities of an existing bargaining unit position, the employer and the Union shall renegotiate the rate of pay for that job." Id. at p. 12, sec. 4.1. The contract provision regarding the posting of positions requires that the Respondent post job openings for a period of at least 10 days during which employees may apply for the position. Employees are to be considered based on seniority, skill, and other qualifications and, if selected, have the right to return to their former position if they fail to perform the new position adequately. Id. at p. 18, sec. 6.2.

The evidence showed that the caseworkers who were reassigned to the non-Medicaid caseloads continued to perform all of the same "essential duties and responsibilities" that they performed before the reassignment. However, the evidence also showed that the portion of their time that those caseworkers spent on some of those duties changed. Most notably, the amount of time that the caseworkers spent helping employees procure essential community resources—and in particular qualifying for entitlement to Medicaid, Social Security, and other benefits—was significantly greater for caseworkers assigned to the non-Medicaid caseload than it was for those assigned to a Medicaid or mixed caseload. This was so because most of the Medicaid clients, unlike the non-Medicaid clients, have already secured the relevant benefits. Hill contends that this change was so significant that the non-Medicaid caseworkers were taking on the work of the staff of the Respondent's entitlements department—a group of employees that focuses on obtaining Medicaid and other funding for clients. The evidence showed that, prior to the creation of the non-Medicaid assignment, employees in the entitlements department would meet with caseworkers on an individual basis to facilitate efforts to obtain various benefits for each caseworkers' relatively few non-Medicaid clients. As mixed-caseload caseworkers, employees were also required to attend supervisory team meetings. After the creation of the non-Medicaid caseload, the Respondent began requiring all of the non-Medicaid caseworkers to attend "collaboration team" meetings with staff of the entitlements department. The purpose of these meetings, like the individual meetings between caseworkers and staff from the entitlements department, was to facilitate efforts to obtain Medicaid and other entitlements for eligible non-Medicaid clients. These bi-weekly meetings lasted 2 to 3 hours and the non-Medicaid caseworkers were the only caseworkers required to attend. In addition to attending the collaboration team meetings, the non-Medicaid caseworkers spent significant amounts of time setting up the appointments that were necessary when seeking Medicaid or other benefits. The evidence indicates that, prior to creation of the non-Medicaid assignment, it was already part of the caseworkers' duties to arrange appointments and help the clients keep those appointments. However, these duties became a larger part of the job for the caseworkers who were assigned non-Medicaid caseloads.

The evidence showed that the number of clients assigned to each non-Medicaid caseworker was significantly higher than the number assigned to each caseworker who had a mixed caseload. Non-Medicaid caseworkers are each assigned approximately 60 to 90 clients, as opposed to the 35 to 50 clients typically assigned to a caseworker with a mixed caseload.[19] Custard acknowledged that the non-Medicaid caseworkers had a larger number of cases, but testified that the larger caseload did not equate with a significant increase in responsibilities because the Respondent does not "look at whether you've seen everybody in your caseload." David Brown, the Respondent's director of adult behavioral health special services, stated that the larger caseload was not a significant increase in responsibilities. This was so, he said: "Because the needs of the client dictate and [the caseworkers] are doing the same thing. So, within the course of the day, it's not going to be any more or less. They're going to do what the needs of the client are for that day." Brown stated that, as a caseworker, one is expected to provide "service to all the clients on your caseload."

Audrey Danley, a union representative who volunteered for the non-Medicaid caseload assignment, testified that, in fact, her responsibilities have increased significantly as a result of taking that assignment. She was responsible for 35 to 40 clients when she had a mixed caseload, but at the time of trial, as a non-Medicaid caseworker, she had 74 clients. Danley described the non-Medicaid caseload as "overwhelming" and stated that she works more paid overtime than before the assignment. While she described her work as a non-Medicaid caseworker as "overwhelming," this does not show a change in

[18] The collective-bargaining agreement is effective by its terms from November 1, 2011, until October 31, 2014.

[19] The Respondent points out that prior to the creation of the non-Medicaid caseworker assignment, there was already a significant amount of variation in the number of cases that were assigned to individual caseworkers. These differences were based on the experience and skill of the particular caseworker as well as on the need levels of the clients assigned to that caseworker. However, this variation occurred within the approximately 35 to 50 case range described above, and the evidence shows that the Respondent made a decision that the non-Medicaid caseworkers would have caseloads in the 60 to 90 case range.

the demands placed on her inasmuch as she also described herself as being "overwhelmed" when she was handling the Medicaid caseload. In fact, she testified that she "volunteered" for the non-Medicaid caseload "[b]ecause, at that time, I was overwhelmed with working with Medicaids, and I wanted a change." (Tr. 63.) The collective-bargaining agreement provides that authorized overtime is compensated at one and half times the regular rate of pay. (R. Exh. 19 at p. 16, sec. 5.2.) No other non-Medicaid caseworker testified that his or her work became more burdensome as a result of being assigned the non-Medicaid caseload. The record evidence does not show whether any non-Medicaid caseworker other than Danley experienced an increase in overtime work, and also does not show by how many hours Danley's overtime increased.

Danley testified that the non-Medicaid clients are the "most needy, because they have no benefits, they have no support system," whereas the clients who have qualified for Medicaid are in a better situation because they are already receiving assistance and generally have housing and a means of transportation. Contrary testimony was provided by Edwards, who denied that the non-Medicaid clients generally require more assistance than the Medicaid clients. She testified that the Respondent rates all clients on a scale of one to five, with a score of one indicating the lowest need level and five indicating the highest. According to Edwards, the non-Medicaid clients, like Medicaid clients, are generally rated in the three to four range. I found Edwards' unrebutted testimony that the need ratings for the two groups are both in the three to four range more specific, objective, and at least as credible as Danley's more impressionistic testimony that the non-Medicaid clients were the "most needy." I find, therefore, that the evidence does not establish that the non-Medicaid clients generally have a higher level of need than the Medicaid clients.

2. Analysis

The General Counsel argues that the Respondent deviated from the collective-bargaining agreement in violation of Section 8(a)(5) and (1) of the Act by filling non-Medicaid caseworker positions without following the job posting provisions of the agreement. Under well-established Board precedent, an employer who is party to an existing collective-bargaining agreement violates Section 8(a)(5) and (1) of the Act by deviating from, or modifying, the terms and conditions of employment established by that agreement without obtaining the consent of the union. *Hospital San Carlos Borromeo*, 355 NLRB 153, 158 (2010), citing *Bonnell/Tredegar Industries*, 313 NLRB 789, 790 (1994); *A.T. Electric Construction Corp.*, 338 NLRB 340, 344 (2002). The General Counsel has the burden of showing, by a preponderance of the evidence, that the Respondent made a change that was material and substantial. *Ampersand Publishing, LLC*, 358 NLRB No. 141, slip op. at 28 (2012); *Fremont Medical Center*, 357 NLRB No. 158, slip op. at 6 (2011).

I find that the General Counsel has failed to meet its burden of showing that the Respondent deviated from the collective-bargaining agreement when it assigned non-Medicaid caseloads to caseworkers. The collective-bargaining agreement contains a management-rights provision that gives the Respondent exclusive rights to assign duties to caseworkers. By agreeing to that provision, the Union conferred on the employer the power to alter assignments unilaterally. See *Cincinnati Paperboard*, 339 NLRB 1079 (2003) (contract provision that gives the employer sole responsibility to schedule and assign work, confers upon employer the power to unilaterally change its shift exchange policy); *United Technologies Corp.*, 300 NLRB 902 (1990) (by agreeing to management-rights clause giving employer sole right to determine shift schedules and hours of work, the union waived its right to bargain over employer's decision to increase overtime shift from 5 to 8 hours). There was credible testimony that the Respondent has, in the past, managed its caseload by assigning cases to caseworkers as it sees fit. The record did not show that case assignments have been subject to bargaining at any point since the adoption of the management-rights provision.

The General Counsel argues that the non-Medicaid caseload assignment was a "position," not merely the assignment of cases, and therefore had to be filled using the contractual posting procedure. Based on the record here, I find that the Respondent's action is more reasonably characterized as the assignment of duties, than as the creation of a position or opening. The evidence indicates that the Respondent redistributed the existing caseload among the pool of caseworkers who were already handling that caseload—not that it added any types of cases to the total caseload or that that it increased (or decreased) the number of caseworkers who were handling that caseload.

It is true that the contractual provision permitting the Respondent to assign work without bargaining is limited by another contract provision which states that if management "substantially increases the job responsibilities of an existing bargaining unit position" it must renegotiate the rate of pay. In this instance, however, the record does not support finding that the obligation to renegotiate pay was triggered. The evidence shows that the caseworkers who were assigned to the non-Medicaid caseloads continued to perform all of the same "essential duties and responsibilities" that they had performed previously, and does not show that they began doing any work that fell outside the scope of those duties and responsibilities. The most significant difference is that the caseworkers who have been assigned the non-Medicaid caseloads spend a more significant portion of their time attempting to qualify clients for Medicaid insurance and other entitlements or sources of funding. The non-Medicaid caseworkers' efforts to obtain these benefits for clients include participation in compulsory biweekly collaboration meetings with staff of the Respondent's entitlements department. The record shows, however, that prior to the assignment of the non-Medicaid caseloads, the duties of caseworkers already included helping clients obtain Medicaid and other entitlements and meeting with staff from the entitlements department.

The evidence does show that when the Respondent assigned the non-Medicaid caseloads to caseworkers, it significantly increased the number of cases assigned to each of those caseworkers. However, the Respondent's witnesses credibly testified that this did not amount to a substantial increase in job responsibilities because, while caseworkers are expected to

provide "service to all the clients on [their] caseload," they are not required to see every client within any particular time period.[20] In an effort to establish that the non-Medicaid caseload should be treated as a "position," the General Counsel relies on the testimony of Danley, a non-Medicaid caseworker and union representative, who stated that the new caseload was "overwhelming." However, I found that testimony unhelpful in assessing the extent of any increase in job responsibilities given that Danley also testified that she was "overwhelmed" by her Medicaid caseload prior to taking the new assignment. Danley also testified that she was working more paid overtime since being assigned the non-Medicaid caseload, however, the record does not quantify that increase, or otherwise demonstrate that it was large enough to constitute a substantial increase in job responsibilities. Moreover, there was no evidence that any other caseworker experienced an increase in overtime upon being reassigned to a non-Medicaid caseload. There are multiple non-Medicaid caseworkers, some of whom presumably are not also union representatives, but none of those other caseworkers were called to rebut the testimony of the Respondent's officials that the new caseload did not substantially increase employees' responsibilities. I find that the record fails to show that the Respondent exceeded its rights under the contract to unilaterally assign duties to employees when it assigned the non-Medicaid caseloads to caseworkers.

For the reasons stated above, I find that the General Counsel has failed to establish that the Respondent violated Section 8(a)(5) and (1) when it assigned non-Medicaid caseloads to caseworkers without using the job posting procedure That allegation should be dismissed.

E.. Clover English and Signing Requirement

The complaint alleges that the Respondent violated Section 8(a)(5) and (1) on about March 12, 2012, when it unilaterally instituted a new requirement that unit employees sign a copy of the transcript from any administrative hearing in which they appeared, and then terminated employee Clover English III for failing to comply with that requirement. The complaint also alleges that the termination of English violated Section 8(a)(3) and (1) because that action was based on English's Union and protected concerted activities.

1. Facts

a. English Declines to Sign Notes of Investigative Interview and is Barred from Returning to Work

English was employed by the Respondent as a therapist beginning in 2010. He was a member of the Union, but did not engage in any notable union activities prior to March 12, 2012. English had a history of difficulties with his immediate supervisor, Deborah Williams, regarding whom he filed multiple grievances. On March 9, 2012, English approached David Whitt, the Respondent's director of Children's Behavioral Health, to seek Whitt's assistance regarding heightened tensions between himself and Williams. Whitt is Williams' immediate supervisor. Whitt said that he would talk to Williams about the problem, but not that day. Whitt told English to come back and let him know immediately if something happened between himself and Williams in the meantime. When English returned to his work area that day, tensions with Williams escalated. The two had a loud exchange of words. English told Williams that she should talk to Whitt, but Williams said that she was English's supervisor and that he had to talk to her. Then, English retreated to his office and locked the door, while Williams followed him and attempted to continue their interaction. Immediately there-after, English went to Whitt's office to discuss the incident.

On March 12, the Respondent conducted an investigative interview with English about the March 9 incident. The interview lasted approximately 1 to 1-1/2 hours. Newsome did most of the questioning, but Respondent officials Whitt, Harden, and Arnold were also present. According to Harden, the subject of the investigation was English having "slammed the door in his supervisor's face." Using a laptop computer, Harden and Arnold took contemporaneous notes of the interview in "question and answer" format. English was accompanied by Union Representatives Hill and LaVedia Smith although neither representative was present for the entire meeting. Newsome refers to this interview as an "administrative hearing," and to the notes that Harden and Arnold took as a "transcript." The evidence shows, however, that no audio recording of the interrogation was made, and that neither Harden nor Arnold was a trained stenographer or court reporter. Harden stated that she, "type[s] up to the best of [her] ability what [i]s discussed" and "tr[ies] to get as close to what they're saying as possible." Arnold testified that the notes she takes are not word-for-word and may not include some things.

After the Respondent's questioning of English concluded, the Respondent printed out a copy of the notes that had been prepared by Harden and Arnold. Newsome reviewed those notes, made some changes, and then had them printed out again. English asked to know what changes Newsome had made, but the Respondent would not tell him. Newsome then presented the revised notes to English and directed him to review them, make any changes that were necessary, and then sign the notes. The following signature block appeared at the bottom of each page:

> Sign:_____ Date:_____
>
> Refusal to acknowledge the veracity or to correct the statement in writing is equivalent to refusal to cooperate with the administrative investigation.

No official of the Respondent was asked to sign the notes or otherwise "acknowledge" their "veracity."

[20] A natural consequence of this assignment system would seem to be that a caseworker assigned to a non-Medicaid caseload will spend, on average, less time on each client than a caseworker with a Medicaid caseload does. Deciding how much of its resources the Respondent will devote to various types of clients is a matter of client care standards, not work standards, and for purposes of the Act is within the Respondent's rights under the management-rights provisions of the contract and arguably within its noncontractual right to make decisions concerning its core entrepreneurial prerogatives. Cf. *Peerless Publications*, 283 NLRB 334 (1987).

Hill had never before seen the signature block language described above.[21] In fact, although Hill had been a union delegate for about 13 or 14 years, and had been involved in numerous investigations, this was the first he heard of the Respondent requiring employees to sign the notes of an investigatory interview. Hill advised English not to sign the notes, but Newsome insisted that English had to do so.[22] Hill discussed this matter with English, as well as with Newsome. At some point, English decided that it might improve his chances of retaining his job if he and the Respondent continued their discussions without Hill present. English asked Hill to leave, and Hill did so.[23]

After Hill left, English continued to refuse to sign the Respondent's notes because he did not think they were accurate or complete. He testified that the notes: "[D]idn't seem to accurately depict what occurred. It seemed to have taken things out." The Respondent offered English the opportunity to correct the notes it had prepared. However, neither English, nor either of the union representatives, had made their own notes of the interrogation and English told the Respondent that, under the circumstances, he did not believe he was capable of correcting the notes. English reiterated that belief while testifying at the hearing before me.

Newsome told English that if he did not sign the notes, he would have to turn over his badge, keys, and other "administerial property." The options the Respondent was offering English were to sign the document as it stood, or to make changes and then sign it. He was not offered the option of signing the document, but adding a notation that the notes were incomplete or inaccurate.

When English continued to refuse to sign the interrogation notes, the Respondent presented him with a one-page document which read as follows:

> I acknowledge that refusal to sign the administrative investigation minutes rises to level of insubordination. I was provided with this directive on *Monday, March, 12, 2012* by, *William Newsome, Director of Human Resources*, of which I refused. This act of insubordination is considered to be impeding the administrative investigation and is Class III infraction punishable by disciplinary policy 6049 # 10.[24]
>
> _____ _____
> Signature Date

The Respondent's disciplinary policy 6049 states that class III infractions are "the most serious violation of policy." The policy states that: "The procedure for handling a Class III infraction is: (a) Suspension with Final Warning and/or (b) Termination of Employment." (R. Exh. 14 at p. 3.) The policy does not provide for the use of lesser levels of discipline for such infractions. Infraction 10 refers to "Insubordination, i.e., willful disobedience of a reasonable order, or other disrespectful conduct to a supervisor, department head or person authorized to give the instruction."

Newsome told English that he could take the notes to his attorney and in "48 hours, give me a call back and let me know where you're at." English indicated that he would do this. Nevertheless, at the end of the meeting, Newsome confiscated English's keys and badge because he had refused to sign the document. The Respondent told English that that he could not return to work if he did not sign the document. (Tr. 215–216.)[25] As of the end of that meeting, English's understanding was that he was on unpaid status. Approximately 2 days later, English left voice mail messages for Newsome and Harden stating that he was still not comfortable signing the notes of the interrogation. English left multiple messages with the Respondent inquiring about his employment status, but neither Newsome nor anyone else from the Respondent returned those messages. The Respondent did not provide English with any written or verbal notice of a change in status of his employment, although it is the Respondent's practice to provide such notice to employees and the evidence showed that, in the past, the Respondent had notified employees who ceased appearing for work that they were going to be suspended or terminated unless they returned. Although Newsome avoided revealing to Eng-

[21] Union Representative Smith had exited the meeting earlier.

[22] Hill testified that Newsome explicitly threatened to fire English if he refused to sign the notes of the interrogation. However, both Newsome and English testified that Newsome had not made such a threat and I credit their consistent testimony on this point. I found English to be a particularly credible witness. He answered questions in a calm, measured, and thoughtful manner and appeared unwilling to strain or exaggerate to help the General Counsel's case or advance his own interests. In several instances he either gave an account that was less favorable to his interests than the account given by Hill, or declined to be led by counsel to give testimony that would further support the allegations. Regarding disputed aspects of the March 12 interrogation, and the subsequent course of events, I credit English's testimony over that of the other witnesses for the General Counsel and the witnesses for the Respondent.

[23] Hill testified that, after a phone conversation with a union organizer, he attempted to advise English to sign the notes, but make a notation that he was signing "under duress." Hill stated that Newsome did not permit him to caucus with English at that time. However, Newsome denied that he had precluded Hill from caucusing with English, and English himself did not recall any such interference by Newsome. Based on this, I find that the evidence fails to establish that Newsome precluded Hill from caucusing with English during the March 12 interrogation.

[24] I have not attempted to correct the punctuation or syntax of this document.

[25] Newsome testified that the reason he took English's keys and badge was that English's confrontation with Williams had been "such a major calamity" that they did not want him returning to his work area until the matter was resolved. Tr. 787. I do not credit this testimony, but rather find that Newsome confiscated English's keys and badge because English would not sign the notes of the interrogation. Prior to taking that action, Newsome informed English that if he did not sign the notes, he would have to turn over his badge and keys, and that such refusal was a class III infraction (punishable by suspension with final warning or discharge). In addition, Newsome himself conceded that he would not necessarily have confiscated the badge and keys if English had signed the Respondent's interrogation notes. Tr. 789. Based on my con-sideration of his demeanor and testimony, and the record as a whole, I did not consider Newsome a credible witness on the subject of the actions he took in reaction to English's refusal to sign the Respondent's interrogation notes, and in particular found his testimony that English was not terminated for that refusal incredible. On that subject, I found Newsome's testimony to be disingenuous, evasive, self-serving, and unworthy of credence.

lish what the post-March 12 status of his employment was, Newsome did tell Harden that his plan was to cast English's refusal to sign the interrogation notes as a voluntary resignation.

The Respondent did not complete its investigation of what transpired between English and Williams, and Newsome testified that no discipline was issued based on that incident.[26] The Respondent's personnel records acknowledge that English's employment ended, but describe English as having resigned even though English never submitted a letter of resignation or verbally informed the Respondent that he was resigning. When the Respondent failed to respond to English's requests for clarification of his job status, English concluded that he had been fired for refusing to sign the notes of his interrogation.

The Respondent presented testimony that, as a formal institutional matter, only CEO Custard has the authority to suspend or terminate an employee and that Custard did not authorize such action with respect to English. One management official, Arnold, initially testified that Newsome also had authority to terminate an employee, but when Respondent's counsel questioned that testimony, Arnold quickly reversed herself. (Tr. 666.) In addition, Newsome stated that what happened to English at the end of the meeting was an "administrative suspension" (Tr. 808), even though Newsome had not presented a suspension recommendation to Custard. Newsome and Arnold both testified that in every instance in which they had confiscated an employee's badge and keys, that employee was either suspended or terminated. (Tr. 667, 807–808.) Arnold further testified that when Newsome confiscated Zeh's badge and keys at the end of the July 22 investigative interview, Zeh was terminated (Tr. 666–667), even though the process had not reached the stage of a disciplinary recommendation to Custard. Custard and Newsome both stated that they were aware that the Respondent had received messages in which English stated that he believed his employment had been terminated, but the evidence shows that neither contacted English to correct that belief.

b. Signing Requirement and Notice Requirement

The Respondent does not have a written policy requiring that the notes of an investigatory interview must be signed by the interviewee. (Tr. 572.) Moreover, the evidence does not show that, prior to English's interrogation, the Respondent had ever required an employee who was being investigated for possible misconduct to either attest to the veracity of the notes of its interrogation of that employee or face discipline. Hill credibly testified that he had been involved in numerous investigations during his approximately 14 years as a union representative, but that the Respondent had never before required the employee being investigated to sign notes of the interrogation. Indeed the evidence shows that the Respondent did not even begin preparing "transcripts" of interrogations until approximately July 2011—approximately 7 months after Newsome became the Respondent's human resources director. In addition, the evidence shows that, in July 2011, when Zeh was interviewed about her alleged misconduct, she was not even asked, much less required, to sign the notes that the Respondent prepared of the interrogation. On February 24, less than a month before the Respondent interviewed English, when the Respondent interrogated employee Andra Johnson about her possible misconduct, it asked her to sign its notes of the interrogation, but there was no signature block or other language stating that by signing Johnson would be attesting to the veracity of the notes, or indicating that refusal to sign would be treated as misconduct. There is no evidence that prior to March 12 the Respondent had disciplined, or threatened to discipline, any employee for refusing to sign the notes of an interrogation, or, for that matter, any other document. In my view, the credible evidence shows at most that the Respondent had made intermittent *requests* that employees sign interrogation notes prior to March 12, but not that it had ever required them to do so. To the contrary, it was not until sometime between the interrogation of Andra Johnson on February 24 and the interrogation of English on March 12, that management added the language that was presented to English and which stated that the employee was signing to attest to the veracity of the notes and that refusal to do so would be considered a class III offense.

The Respondent did not provide any prior notice to the Union before implementing the policy requiring employees who are interrogated about possible misconduct to attest to the veracity of notes of the interrogation and further providing that refusal to do so would be considered an infraction. The collective-bargaining agreement includes a management-rights provision that, in addition to the provisions previously described, states that the Respondent "has the right to make and alter from time to time reasonable rules and regulations, not inconsistent with this Agreement, to be observed by employees," and that an employee's "failure to carry out orders, instructions or directives, shall be deemed to be just cause for discharge or other discipline, provided that such discharge or discipline, as well as the reasonableness of the orders, instructions or directives, shall be subject to the grievance procedure." (R. Exh. 19 at p. 10, secs. 3.0 and 3.2.) Whatever latitude that language gives the Respondent, however, is limited by a contractual notice requirement, which states:

> All new or revised policies and procedures relating to bargaining unit employees shall be distributed to the Executive Board Members [of the Union] no less than 30 days prior to implementation whenever possible.

(R. Exh. 19 at p. 41, sec. 20.1; see also Tr. 508–509.) The Respondent does not claim that it complied with that contractual

[26] Since the Respondent did not, in fact, take disciplinary action against English based on the March 9 incident with Williams, or even complete its investigation of that incident, I do not reach a determination as to whether the Respondent would have acted lawfully had it, contrary to the facts here, disciplined English based on what happened on March 9. See *Grand Central Partnership*, 327 NLRB 966, 975 (1999) (Under *Wright Line*, an employer cannot carry its burden of persuasion by merely showing that it had a legitimate reason for imposing discipline against an employee, but must show by a preponderance of the evidence that the action would have take place even without the protected conduct.); *Hicks Oil Hicksgas*, 293 NLRB 84, 85 (1989), enfd. 942 F.2d 1140 (7th Cir. 1991) ("A judge's personal belief that the employer's legitimate reason was sufficient to warrant the action taken is not a substitute for evidence that the employer would have relied on this reason alone.").

notice provision before imposing the policy regarding the signing of interrogation notes and based on Hill's testimony and the record as a whole, I find that it did not do so.

According to Newsome, the purpose of the signing requirement was to have the employee "attest to the veracity of what they're saying." Custard said the purpose was "to make the person think about it," to "give them an opportunity to change it." Custard testified that even if an employee refused to sign the notes of an interrogation that would not prevent the Respondent from using the facts ascertained in the interview in its investigation.

Subsequent to March 12, the Respondent has continued to apply its new policy requiring employees to sign investigatory interviews to attest to their accuracy. At one or more labor management meetings between April and July 2012, the Union demanded to bargain over this policy, but the Respondent refused to do so.

2. Analysis

a. Implementation of signature rule

An employer violates Section 8(a)(5) and (1) of the Act when it makes a unilateral change regarding a mandatory subject of bargaining. *NLRB v. Katz,* supra; *Whitesell Corp.*, supra; *Ivy Steel & Wire, Inc.,* supra; *Mercy Hospital of Buffalo,* supra ; *Associated Services for the Blind,* supra. For a change to trigger the duty to bargain, the change must be "material, substantial, and significant." *Crittenton Hospital*, 342 NLRB 686 (2004); *Bath Iron Works Corp.*, 302 NLRB 898, 901 (1991).

I find that the Respondent did make a change that was material, substantial, and significant on March 12, 2012, when it implemented a new rule that required employees who were interrogated about possible wrongdoing to sign notes of the interrogation to attest to the accuracy of those notes, and which provided that refusal to sign would be considered an infraction for which the employee would be subject to termination or suspension with a final warning. The Board has, on multiple occasions, held that an employer makes a material, substantial, and significant change when it introduces a new form and/or signature requirement. In *Garney Morris, Inc.*, for example, a Section 8(a)(5) violation was found where the employer unilaterally implemented a new, more detailed, disciplinary warning form and a new rule that employees sign that form or be barred from the workplace. 313 NLRB 101,119–120 (1993), enfd. mem. 47 F.3d 1161 (3d Cir. 1995). In *Brimar Corp.*, 334 NLRB 1035 (2011), the Board held that the employer "violated Section 8(a)(5) of the Act by its promulgation and implementation of new 'workstation forms' without giving the Union timely notice and an opportunity to bargain concerning the forms, and by dealing directly with its employees by requiring them to sign the new forms." In that case, the Respondent had preexisting production quotas, but was found to have violated Section 8(a)(5) by creating a new form that set forth those quotas and then requiring employees to sign the form. In *Frontier Hotel & Casino*, the Board held that an employer violated Section 8(a)(5) by unilaterally imposing a requirement that union representatives, as a condition for entering the employer's facility, sign a document to acknowledge their familiarity with an existing rule relating to their activities within the plant. 323 NLRB 815, 817–818 (1997). The Board specifically rejected the notion that such a requirement was "a minor administrative detail," explaining that "[h]aving a document thrust at them with a demand for signature" under the circumstances present "would reasonably have been a cause for alarm." Id. at 818. In the instant case, the new signature requirement is as much of a "cause for alarm" as the requirement in *Frontier Hotel & Casino.* The Respondent is requiring that employees who undergo potentially lengthy interrogations that may result in their discipline either attest to the accuracy of the Respondent's "question and answer" format notes of the interrogation or correct and complete those notes without the benefit of an audio recording. Many employees will already be alarmed when undergoing an interview that may lead to their discipline, and that state of alarm is likely to be significantly heightened by having notes of the interview "thrust at them with a demand for signature." In the instant case, the imposition of the signature requirement is a particularly significant change given that the Respondent also announced that failure to comply with it was the type of offense for which discharge or suspension with final warning is the designated penalty. It is well-settled Board law that new work rules that invoke discipline are mandatory subjects of bargaining. *California Offset Printers, Inc*., 349 NLRB 732 (2007), citing *Toledo Blade Co*., 343 NLRB 385, 387 (2004); see also *General Die Casters*, 359 NLRB No. 7, slip op. at 1-2 (2012) (employer makes unlawful unilateral change by beginning to discipline employees for misconduct for which it did not previously impose discipline).

The Respondent contends that the announcement of this rule was not a change because the Respondent had long expected employees to tell the truth during investigations and considered it an offense for an employee to interfere with an investigation. This argument is unpersuasive for two reasons. First, the Board has held that even when an employer has a preexisting prohibition it makes a material change when it begins to discipline employees under that prohibition based on a type of conduct for which it had not previously imposed discipline. *General Die Casters, Inc.*, supra. That is what the Respondent did here. Second, the signature requirement imposed on March 12 was discrete from any requirement that employees be truthful and not interfere with investigations. Indeed, the evidence does not show that English was untruthful or that he interfered in any way with the investigation. To the contrary, English appeared for the interrogation, answered the questions that were posed, and even excused his union representative in an effort to facilitate communication between himself and the Respondent. Moreover, English cannot reasonably be characterized as having "interfered" with an investigation by declining to attest to the veracity of interrogation notes that he did not believe were accurate or complete. At any rate, as Custard testified, the Respondent can use any information that it obtains during an investigative interview regardless of whether the interviewee signs the Respondent's notes of the interview.

The Respondent argues that even if implementation of the signature rule would usually require notice and bargaining, management was privileged to act as it did based on the management-rights clause in the collective-bargaining agreement.

See *Provena St. Joseph Medical Center*, 350 NLRB at 815, *Cincinnati Paperboard*, 339 NLRB 1079, *United Technologies Corp.*, 300 NLRB at 902. However, whatever freedom is granted to the Respondent under that provision is limited by the provision requiring the Respondent to notify the Union of "all new or revised policies and procedures relating to bargaining unit employees . . . no less than 30 days prior to implementation whenever possible." In this case, the Respondent did not give the Union the required notice (or any notice) before implementing the new signature requirement, and the Respondent has not claimed that providing such notice would have been impossible, or even difficult. Thus it is clear that the Respondent's March 12 implementation of the signing requirement was not authorized by the collective bargaining agreement.[27]

For the reasons discussed above, I find that the Respondent violated Section 8(a)(5) and (1) on March 12, 2012, when it unilaterally implemented the policy that employees who undergo investigative interviews are required, subject to discipline, to sign the notes of the interview in order to attest to the veracity of those notes.

b. Separation of English

The General Counsel alleges that the Respondent unlawfully discharged English for violating the rule regarding the signing of interrogation notes, a rule which was unlawfully implemented. An employer violates Section 8(a)(5) and (3) when it takes disciplinary action against an employee pursuant to an illegally implemented procedure or rule. See *General Die Casters, Inc.*, supra, slip op. at 2 (employer violates Sec. 8(a)(5) when it discharges an employee for violating an unlawfully implemented rule); *Aldworth Co.*, 338 NLRB 137, 147 fn. 48 (2002) (terminations effected under a unilaterally adopted change in terms and conditions of employment "violate Sec. 8(a)(5) of the Act as well as Sec. 8(a)(3)"), enfd. sub nom. *Dunkin' Donuts Mid-Atlantic Distribution Center v. NLRB,* 363 F.3d 437 (D.C. Cir. 2004). As discussed above, the Respondent unlawfully implemented the requirement that employees sign the notes of investigative interviews. The only question, and it is not much of a question given the facts and applicable law, is whether the Respondent discharged English for refusing to comply with the unlawfully implemented signature requirement, or whether, as the Respondent claims, English simply resigned. For the reasons discussed below, I find that the Respondent discharged English.

On March 12, the Respondent confiscated English's employee badge and keys and told him that he could not return to work unless he signed the interrogation notes. The Respondent did this after advising English that refusal to sign the notes was a class III offense and thus punishable by discharge or suspension with a final warning. For purposes of the Act, confiscating an employee's keys and badge and stating that the employee cannot return to work until he complies with an unlawfully implemented requirement is the same as discharging an employee for refusing to comply with that requirement. "You are fired" or "you are discharged" are not "magic words" that must be uttered by an employer in order to accomplish a discharge for purposes of the Act. *Atlantic Interstate Messengers,* 274 NLRB 1144, 1150 (1985); see also *American Linen Supply Co.*, 297 NLRB 137, 145 (1989) ("magic words" "cannot be used to obscure motive and intent" when the evidence shows that the employer's "desire was to discharge" employees), enfd. 945 F.2d 1428 (8th Cir. 1991). Under the decision in *Atlantic Interstate*, an employer discharges employees when it orders them to surrender their keys and employee cards, even if it does not use any "magic words" of discharge. 274 NLRB at 1150; see also *Davis Transport*, 169 NLRB 557 (1968) (employer order that employees turn in their equipment is sufficient to constitute discharge).

In the instant case not only did the Respondent order English to turn in his keys and identification card, but also told him that he could not return to work unless he complied with the unlawful signature requirement and warned him in writing that his refusal to sign was the type of infraction punishable by discharge. Then it declined to respond when English called to find out if he still had job. No witness for the Respondent claimed, contrary to the other evidence, that the company would have allowed English to return to work given his refusal to comply with the unlawful signature requirement. Thus it is clear that, despite the fact that the employer avoided using the words "fired" or "discharged," it did, in fact, discharge English for refusing to sign the notes. Assuming it is true that only Custard, not Newsome, had authority to discharge an employee as the term "discharge" is used by the Respondent, that is neither here nor there given the facts and law applicable here. An agent of the Respondent confiscated English's keys and badge and told him he could not return to work unless he complied with the unlawful signature requirement. Those are actions that, for purposes of the Act, amount to discharge for failure to comply with the unlawfully imposed rule.

In its brief, the Respondent disingenuously contends that it should not be seen as having discharged English, because English failed to test his employment status by simply appearing for work. However, it was not possible for English to simply appear for work since the Respondent had confiscated his work keys and identification and refused to return Hill's repeated attempts to contact management. Indeed, Newsome conceded that English's badge and identification were confiscated in order to prevent English from entering the workplace. Newsome testified, moreover, that employees who have been suspended cannot enter its facilities (Tr. 776), and the record shows that Hill was told that he would be immediately terminated if he entered onto any of the Respondent's properties during the period of a suspension. (GC Exh. 58 at p. 2.)

For the reasons discussed above, I find that the Respondent violated Section 8(a)(5) and (1) and (3) and (1) when it discharged English on March 12, 2012, for refusing to comply with the unlawfully implemented signature requirement.

[27] Since I find that the Respondent's no-notice implementation of the signature requirement was not authorized by the collective-bargaining agreement, I do not reach the question of whether the agreement would have permitted the Respondent to unilaterally implement the change as a "reasonable rule" had the Respondent given the required notice.

F. Allegation that Newsome Unlawfully Restricted the Right of Union Representatives to Participate in Investigatory Meetings in Violation of Section 8(a)(1)

The complaint alleges that on about February 10, 2012, and March 12, 2012, the Respondent, by Newsome, unlawfully restricted the right of an employee's union representative to participate in an investigatory meeting.

Facts and Analysis

An employer violates the *Weingarten* rights of an employee when it refuses to allow the employee's union representative to participate and assist the employee during an investigative interview that may result in discipline. *Postal Service*, 351 NLRB 1226 (2007). The union representative is entitled not only to attend, but to provide advice and active assistance, and cannot be required to sit silently like a mere observer." *Barnard College*, 340 NLRB 934, 935 (2003). This allegation concerns statements that Newsome made to Hill during the investigatory interviews of Johnson and English. The facts regarding these interviews are discussed above. Although there was apparently some friction between Hill and Newsome, at least during the interview of Johnson, Hill himself testified that the Respondent did not prevent him from saying anything, or from representing employees, during these meetings. As discussed above, I do not credit Hill's testimony that Newsome repeatedly told him to "shut up" during the questioning of Johnson or that Newsome prevented him from caucusing with English during that interview. The General Counsel does not point to other actions by the Respondent at investigatory meetings in February and March 2012 to support the complaint allegation that the Respondent unlawfully restricted the union representative's right to participate.

The evidence does not support finding that the Respondent unlawfully restricted the right of the union representative to participate and assist employees during interviews in on about February 10, 2012, or March 12, 2012. That complaint allegation should be dismissed.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent violated Section 8(a)(1) of the Act: on July 18, 2011, when the Respondent discriminatorily required Hill to provide documentation regarding his immigration and/or citizenship status because of Hill's union and protected concerted activities; on July 22, 2011, when it threatened unit employee Zeh with discharge during an investigatory interview because Zeh engaged in protected activity by seeking clarification of the subject matter of the investigation; in July and/or August when it investigated Hill for Medicaid fraud, searched his office, and blocked entry to his office, all because Hill provided union representation to Zeh during the investigatory interview on July 22, 2011; on August 2, 2011, when the Respondent discriminatorily required Hill to provide the declarations page for his automobile insurance because of Hill's union and protected concerted activities; and, when it barred Hill from entering any of the Respondent's facilities other than the one where his workstation was located because of Hill's union and protected concerted activities.

4. The Respondent violated Section 8(a)(5) and (1) of the Act: in or about January 2012, when the Respondent, by Edwards, implemented a new incentive program for unit employees without providing the Union with notice and an opportunity to bargain; in or about January 2012, when the Respondent, by Edwards, bypassed the Union and dealt directly with unit employees regarding a new incentive program; on March 12, 2012, when it unilaterally implemented a policy requiring unit employees who undergo investigative interrogations to sign notes of the interrogation in order to attest to the veracity of those notes; and on March 12, 2012, when it discharged English for refusing to comply with the unlawfully implemented signature requirement.

5. The Respondent violated Section 8(a)(3) and (1) of the Act by: discriminatorily suspending Hill because he provided union representation to unit employee Zeh during an investigatory interview on July 22, 2011; and on March 12, 2012, by discharging English pursuant to the unlawfully implemented signature requirement.

6. The Respondent was not shown to have committed the other violations alleged in the complaint.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. The Respondent, having unlawfully suspended employee Alton Hill, must make him whole for any loss of earnings and other benefits. In addition, having unlawfully discharged employee Clover English III, the Respondent must offer him reinstatement and make him whole for any loss of earnings and other benefits. Backpay for both Hill and English, as well as any other employees who suffered losses as a result of the unlawful signature requirement, shall be computed in accordance with *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center,* 356 NLRB No. 8 (2010). The Respondent shall file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters. Respondent shall also compensate the employees for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year, *Latino Express, Inc.,* 359 NLRB No. 44 (2012).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended order.[28]

[28] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

The Respondent, Murtis Taylor Human Services Systems, Cleveland, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening its employees with discipline, discharge, or other unspecified reprisals because they engage in union and/or protected concerted activity.

(b) Requiring its employees to provide documentation confirming their immigration and/or citizenship status because they have engaged in union and/or protected concerted activity.

(c) Requiring its employees to provide the declarations page of their automobile insurance because they have engaged in union and/or protected concerted activity.

(d) Initiating a fraud investigation against its employees because they have engaged in union and/or protected concerted activity.

(e) Searching or blocking access to employees' offices because they have engaged in union and/or protected concerted activity.

(f) Barring employees from any of its facilities because they have engaged in union and/or protected concerted activity.

(g) Suspending, discharging, or otherwise discriminating against its employees because they have engaged in union and/or protected concerted activity.

(h) Unilaterally and in a manner that is not authorized by the collective-bargaining agreement, implementing a rule requiring that employees, under the threat of discipline, sign a copy of any notes of an investigative interview.

(i) Suspending, discharging, or otherwise discriminating against its employees because they refuse to comply with an unlawfully adopted rule.

(j) Bypassing the Union and dealing directly with unit employees concerning changes to their wages, hours and other working conditions.

(k) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful suspension of Alton Hill, and within 3 days thereafter notify Hill in writing that this has been done and that the suspension will not be used against him in any way.

(b) Make Alton Hill whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful termination of Clover English III, including any reference suggesting that English resigned his position, and within 3 days thereafter notify English in writing that this has been done and that the termination will not be used against him in any way.

(d) Within 14 days from the date of the Board's Order, offer Clover English III, full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(e) Make Clover English III, and any other employees affected, whole for any loss of earnings and other benefits suffered as a result of the unlawfully imposed requirement that an employee sign a copy of notes of an investigative interview, in the manner set forth in the remedy section of the decision.

(f) Upon request by the Union, rescind the rule that requires unit employees to sign a copy of any notes of an investigative interview.

(g) Upon request by the Union, rescind the incentive program that it unlawfully implemented in about January 2012.

(h) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(i) Within 14 days after service by the Region, post the attached notice marked "Appendix" in each of its facilities in the City of Cleveland, Ohio, and the Greater Cleveland Area.[29] Copies of the notice, on forms provided by the Regional Director for Region 8, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 18, 2010.

(j) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. May 21, 2013.

[29] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT threaten you with discipline, discharge or other unspecified reprisals because you engage in union and/or protected concerted activity.

WE WILL NOT require that you provide documentation confirming your immigration and/or citizenship status because you engage in union and/or protected concerted activity.

WE WILL NOT require that you provide the declarations page of your automobile insurance because you engage in union and/or protected concerted activity.

WE WILL NOT initiate a fraud investigation against you because you engage in union and/or protected concerted activity.

WE WILL NOT search or block access to your office because you engage in union and/or protected concerted activity.

WE WILL NOT deny you access to any of our facilities because you engage in union and/or protected concerted activity.

WE WILL NOT suspend, discharge or otherwise discriminate against you because you engage in union and/or protected concerted activity.

WE WILL NOT, unilaterally and in a manner that is not authorized by the collective-bargaining agreement, implement a rule requiring you, under threat of discipline, to sign a copy of any notes of an investigative interview.

WE WILL NOT bypass the Union and deal directly with you concerning changes to your wages, hours, and other working conditions.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL remove from our files any reference to our unlawful suspension of Alton Hill and notify him in writing that this has been done and that the suspension will not be used against him in any way.

WE WILL make Alton Hill whole for any loss of earnings and other benefits suffered as a result of his unlawful suspension in the manner set forth in the remedy section of the decision.

WE WILL remove from our files any reference to the unlawful termination of Clover English III (including any reference suggesting that English resigned his position) and notify English in writing that this has been done and that the termination will not be used against him in any way.

WE WILL offer Clover English III full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Clover English III and any other affected employees, whole for any loss of earnings and other benefits suffered as a result of the unlawfully imposed requirement that employees sign a copy of notes of an investigative interview.

WE WILL, upon request by the Union, rescind the rule that requires you to sign a copy of notes of an investigative interview.

WE WILL, upon request by the Union, rescind the incentive program that we unilaterally implemented in about January 2012.

MURTIS TAYLOR HUMAN SERVICES SYSTEMS